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COMMITTEE ON JUDICIARY

March 16, 2005

LB 506, 760, 143, 377, 292, LR26CA

The Committee on Judiciary met at 1:30 p.m. on Wednesday, March 16, 2003, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB 506, LB 760, LB 143, LB 377, LB 292, and LR 26CA. Senators present: Patrick Bourne, Chairperson; Ray Aguilar; Ernie Chambers; Jeanne Combs; Mike Flood; Mike Foley; and Mike Friend. Senators absent: Dwite Pedersen, Vice Chairperson.

SENATOR BOURNE: Welcome to the Judiciary Committee. This is our 22nd day of committee hearings. We have six bills on the agenda today. My name is Pat Bourne. I'm from Omaha. To my left is Senator Friend from Omaha, Senator Aguilar from Grand Island. Our committee clerk is Laurie Vollertsen. Our legal counsel is Jeff Beaty and Senator Chambers from Omaha as well. I will introduce the other members as they arrive. Please keep in mind that from time to time during the afternoon senators will come and go, conducting other legislative business or introducing bills so if they happen to leave during your testimony please don't take that personally. They're simply conducting other business. If you plan to testify on a bill we're going to ask that you use the two on-deck chairs where that gentleman is signing in. We want you to sign in in advance and print your information so it's readable and can be entered into the permanent record. Following the introduction of each bill I'll ask for a show of hands to see how many people plan to testify on a particular measure. The introducer will go first. We'll have proponent testimony, opponent testimony, then we'll take neutral testimony and closing if the senator desires to do so. When you come forward to testify, please clearly state and spell your name for the record. All of our hearings are transcribed and your spelling of your name will help the transcribers immensely. Due to the large number of bills heard here in the Judiciary Committee we do utilize a timing system. The senator introducing a bill will get five minutes to open, three minutes to close if they choose to do so. All other testifiers get three minutes to testify exclusive of any questions the committee may ask. The blue light will go on at three minutes. The yellow light will come on as a one-minute warning, and then when the red light comes on we ask you to conclude your testimony. The rules of the

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Legislature state that cell phones are not allowed so if you have a cell phone on your person please make sure the ringer is disabled. We also will not allow you to read someone else's testimony. If you have a letter that you would like to submit we will gladly take that and enter it into the record but we won't allow you to read that. With that, we've been joined by Senator Flood from Norfolk and Senator Combs from Milligan. The first bill on the agenda is LB 506. Senator Erdman to open on that bill. Welcome.

LB 506

SENATOR ERDMAN: Thank you, Senator Bourne, members of the Judiciary Committee. My name is Philip Erdman. I represent the 47th Legislative District. I'm here to introduce LB 506. LB 506 would change the state's method of execution from electrocution to lethal injection. Today of the 38 states that have the death penalty, Nebraska is the only state that uses electrocution as the sole method of execution. I have worked with the Attorney General's Office in bringing LB 506 to you today and there are representatives here from the Attorney General's Office who will testify. LB 506 is similar to LB 526 and introduced last session and LB 2 introduced during the special session in 2002. As I said, there will be later testimony to address some of the technical and legal aspects of the bill. However, I'd like to summarize LB 506 briefly for the committee. First, if LB 506 is passed, those currently on death row would have one opportunity within 30 days of its effective date to choose between electrocution and lethal injection. If an inmate does not choose a method, death will be by lethal injection. Courts in several jurisdictions have held that providing a choice is constitutional. This would apply to the eight people currently on death row and anyone else sentenced to the punishment of death prior to the effective date. In cases where the individual is being punished for a crime that is committed before the bill's effective date but is sentenced after its effective date the person must choose between lethal injection or electrocution within 30 days after the sentence is affirmed by the Nebraska Supreme Court. This would include individuals who commit crimes before the effective date of the act but whose sentence is pending or a resentence has been granted as of the effective date of the

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act. Again, if the individual fails to choose, lethal injection will be the mode of punishment. Finally, in all cases where the crime is committed on or after the effective date of the act the method of execution will be lethal injection. In other words, going forward Nebraska will rely on lethal injection as its method for applying the death penalty. However, if either the Nebraska Supreme Court or the United States Supreme Court declares that either electrocution or lethal injection unconstitutional the bill provides that the remaining statutory mode will automatically be applied. I think that by providing this option we can assure that a single court action related to the mode of execution does not immediately invalidate Nebraska state law. The remaining changes made by the bill are generally clean-up in nature to reflect changes, procedures, and department names. I would like to talk briefly about why I think we should take this action. First, there is a constitutional question of whether electrocution is unconstitutionally cruel and unusual punishment and in violation of the United States and Nebraska constitutions. Violation of the Eighth Amendment of the United States Constitution and Article I, Section 9 of the Nebraska Constitution. While I'll leave the technical discussion of the constitutional questions to others testifying today from a nonlegal prospective it appears that since Nebraska is the last state to use electrocution exclusively it becomes likely that a court might rule Nebraska's statute unusual and in violation of the state or federal constitution. Beyond the issue of constitutionality, I think we should look at current trends in other states on this issue. Of the 38 states that now have the death penalty, there are five methods of execution used: lethal injection, electrocution, hanging, lethal gas, and firing squad. Of the 38, ten have electrocution and of those ten, nine have lethal injection as an alternative method with Nebraska as the lone exception. Five of the 38 states have both lethal gas and lethal injection. Three of the 38 have hanging and lethal injection while another three have firing squad and lethal injection. The remaining 18 states have only lethal injection. Therefore, 37 of the 38 states that have the death penalty have lethal injection as a method of execution with the sole exception of Nebraska. In summary, it's time for Nebraska to change its method of execution from electrocution to lethal injection. If Nebraska is going to have the death penalty and a

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majority of Nebraskan citizens believe we should, it is up to the Legislature to act to avoid potential problems created by the fact that Nebraska is the only state solely relying on electrocution. Thank you and I'd try to answer any questions you may have.

SENATOR BOURNE: Thank you. Are there questions for Senator Erdman? Seeing none, thank you. (See also Exhibits 1, 2)

SENATOR ERDMAN: Thank you.

SENATOR BOURNE: Can I have a show of hands of those here to testify in support of this bill? I see one, oh excuse me, two. Those in opposition? I see five. Those neutral? I see one. Would the first proponent come forward and I assume you've signed in.

J. KIRK BROWN: Yes.

SENATOR BOURNE: Okay. Were you going to use the on-deck area? Welcome.

J. KIRK BROWN: Mr. Chairman, members of the committee, my name is J. Kirk, K-i-r-k Brown, B-r-o-w-n. I'm currently the solicitor general for the Nebraska Department of Justice. Over the last 20 years I have represented the state of Nebraska in death penalty litigation in the state and federal courts. And I appear here today to testify in favor of LB 506 at the request of the Governor and with the approval of the Attorney General. As I have testified previously in favor of the goal of LB 506, first in the special session and again in support of LB 526 in the 2003 session, I will not attempt to repeat that testimony today but will attempt to update the committee on developments on this issue since my last testimony and ultimately answer any questions the committee may have on this question. The Nebraska Legislature has determined that death should be a potential punishment for the worst of the first-degree murders committed in this state. It is also the responsibility of this body to authorize and direct the Nebraska Department of Correctional Services with respect to the method or methods by which a court-ordered sentence of death is to be enforced by that department. The sole method of execution now authorized by this body is electrocution. Electrocution has been the legislatively chosen method of



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execution in Nebraska since the early 1900s. LB 506 would alter the method of execution from electrocution to lethal injection. Lethal injection is currently the most common method for enforcing a sentence of death employed by other states and the federal government. The Governor and the Attorney General support LB 506. From a legal standpoint, for many years the state and federal courts summarily found constitutional challenges to electrocution to be without merit. However, recently the cost to the state of Nebraska of defending electrocution has increased dramatically. Both Otoe County and Scotts Bluff Counties have been required to conduct extensive trial level hearings as a result of constitutional challenges to electrocution raised by the defendant. Requests for similar hearings have been made by defendants in the prosecutions of the Norfolk bank robberies. In 2003, the Nebraska Supreme Court did not rule upon the constitutionality of electrocution but noted that certain U.S. Supreme Court rulings may call that into question. The constitutionality of electrocution will be before the Nebraska Supreme Court again in State v. Carey Dean Moore which is scheduled to be argued in May of this year. And in the future, we expect similar challenges in most, if not all, potential capital cases. At this time, Nebraska has electrocution as its sole means of enforcing a death sentence. Nine of 40 jurisdictions having death penalties have electrocution as an alternative method of enforcing a death sentence. The Supreme Court of the United States last considered electrocution as a method of execution in 1890 and found it constitutional. In recent years, it has declined on several occasions to take up the question of reconsidering its decision on electrocution. However, recent decisions on other Eighth Amendment issues at least make a legitimate argument or make it possible for defendants to assert a legitimate argument that electrocution may be unconstitutional.

SENATOR BOURNE: Could you conclude, Mr. Brown?

J. KIRK BROWN: What?

SENATOR BOURNE: Your time has expired.

J. KIRK BROWN: Yeah. LB 506 provides yet another humane mechanism for enforcing a court order of a sentence of death. The advantage of lethal injection is it cannot be

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argued to be unusual in the United States at this time and therefore we believe would significantly reduce the risk of this Legislature's chosen method of execution being found unconstitutional.

SENATOR BOURNE: Thank you. Questions for Mr. Brown?  
Senator Chambers.

SENATOR CHAMBERS: Mr. Brown, are you aware of any areas of the law where the Nebraska Supreme Court has chosen not to follow the majority authority in the country on a particular legal issue?

J. KIRK BROWN: Well, I guess what other jurisdictions do outside of the pronouncements of the U.S. Supreme Court are simply, I mean, are persuasive rather than binding so I don't know that I've made a comprehensive study of that. Certainly, they weigh what other jurisdictions are doing and how they've ruled in making their decisions.

SENATOR CHAMBERS: Well, I know of a number of cases where the court said exactly what you stated in ruling contrary to what is called the weight of authority. But this is the question that I was going to ask and you anticipated it. No matter what other courts have ruled in terms of a court saying, if a new method of execution were put into place, that could legally be applied to those who had been sentenced to die with a different method of execution prior to the introduction of the new one. Regardless of how many courts ruled that way the Nebraska Supreme Court could rule otherwise, couldn't it?

J. KIRK BROWN: Well, certainly, with respect to the question of Nebraska law or the requirements of the Nebraska Constitution they could. I don't know that they're at liberty to second-guess...if it was raised as a federal constitutional issue they'd be bound by U.S. Supreme Court precedent. But as a matter of state law they would be free to rule as they desire.

SENATOR CHAMBERS: My final question after that long series that I put you through (laugh). You know, we've gone through some things in the past (laughter). If a state has a death penalty and this might seem like a rhetorical question, there is nothing which requires that any death

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penalty actually be pronounced in any case, is there?

J. KIRK BROWN: If your question is, is there anything under Nebraska law that makes a death penalty mandatory, the answer to that would be no.

SENATOR CHAMBERS: Thank you. That's all that I have.

SENATOR BOURNE: Further questions? Seeing none, thank you, Mr. Brown.

J. KIRK BROWN: Okay.

SENATOR BOURNE: Next testifier in support? No other testifiers in support? The first testifier in opposition and again we're going to make use of the on-deck area so if you're opposed to the bill, please make your way forward to these two on-deck areas and sign in. Thank you. Welcome.

ERIC ASPENGREN: (Exhibit 3) Senators and Senator Bourne, I'd like to thank you for having me here. My name is Eric Aspengren. I represent Nebraskans Against the Death Penalty. We are primarily a membership-based organization and represent the views of thousands of Nebraskans statewide. My organization stands in opposition to lethal injection as a mode of execution for basically one reason. We oppose the death penalty in any manner. The taking of a human life no matter how it is done is still the taking of a human life and is wrong no matter if it is at the hands of an individual or if it is done by the state. That being said, I think it is important for me to say something about lethal injection itself. Throughout the United States history with capital punishment, there have been many numerous attempts to devise a mode of execution that is not cruel and unusual. These new methods of punishment come about as the previous methods have each been rejected as mandated by the Eighth Amendment of the United States Constitution as cruel and unusual. We have seen hanging, firing squad, the guillotine and the gas chamber disappear as the citizens of the United States and other nations have decided that those methods are cruel and unusual. And except in the case of Nebraska the electric chair has been replaced in states that have the death penalty by a new method. This method, lethal injection, was designed in yet another attempt to devise a humane method of execution.

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Despite what you think of the death penalty itself, the Eighth Amendment mandates this. I don't believe that lethal injection meets that mandate and I believe it is the responsibility of the state to prove that it does before it gets used in Nebraska. Again, having said that, I would like to reiterate the position of Nebraskans against the death penalty. Our members believe that life is to be respected and that the taking of a life by an individual or the state is wrong. If you have any questions, I'd be glad to answer them.

SENATOR BOURNE: Thank you. Are there questions for Mr. Aspengren? Seeing none, thank you. Next testifier in opposition?

MICHAEL RADELET: Thank you, Senators. My name is Michael Radelet, R-a-d-e-l-e-t. I'm chair of the sociology department at the University of Colorado in Boulder. I've been doing research on the death penalty since 1979, just published in 2004 a book chapter and a book published by Cambridge University Press on botched executions. And it turns out that the most frequently botched method of execution today is lethal injection. That is resulting in a number of emerging challenges to lethal injection that I thought you should be aware of. The principal one is challenging medical licenses of physicians who are involved in lethal injections and if there is a lethal injection that takes place there must be...most states, all states have physicians at least as backups in case they can't find a good vein or in case there's problems. And physicians are in the prison in opposition, direct contradiction to the ethical codes of the American Medical Association in case the inmate needs further medical procedures such as a cutdown procedure to be put to death. I'll leave this chapter with legal counsel but I do want to say that there's several different ways in which lethal injections can be botched or can go wrong. One is a noninstantaneous death where after the first dose of drugs are administered it takes quite a long time for the inmate to die. Cases, for example, a kink in the plastic tubing. There was a case where the...a couple cases where the tubes were clogged by drug combinations so that led to delays. In one case the inmate was strapped to the gurney too tightly and that caused a noninstantaneous death. A second problem with lethal injection is painful death and at least in a dozen

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cases, for example, in the case of a drug addict where it takes many attempts to find a good vein and it ends up that the person is eventually executed with a needle in the groin or between the toes or sometimes in the shoulder or actually in his neck. Two other inmates have had collapsed veins. One obese inmate had a real problem because his veins were quite small. There have been signs of audible distress in several executions and finally, lingering death. There have been a handful cases that literally have taken over an hour for the execution technicians to find a decent vein. So lethal injections are not as easy as some of its proponents would suggest. Thank you.

SENATOR BOURNE: The amber light means you still have a minute so...

MICHAEL RADELET: My God (laughter). In this afternoon's lecture there are 334 points I'd like to make (laughter).

SENATOR BOURNE: Thank you. (laugh) Are there questions for Dr. Radelet?

SENATOR CHAMBERS: Just one. Are you going to testify on the other bill?

MICHAEL RADELET: Yes, I am.

SENATOR CHAMBERS: Okay. Then I'll save my questions for then.

MICHAEL RADELET: Terrific.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you. Next testifier in opposition?

CRAIG GROAT: (Exhibit 5) Craig Groat. I believe it's critically important...

SENATOR BOURNE: Excuse me, sir. Could you spell your last name?

CRAIG GROAT: It's Groat, G-r-o-a-t.

SENATOR BOURNE: Thank you.

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CRAIG GROAT: I believe it's critically important that those that are in favor of lethal injection on the death penalty are aware of how the rest of the developed world sees the United States and the proponents of the death penalty so I shall use their words. America clings to execution as it clings to handguns and the flag. It is a social ritual, a harking back to frontier justice and lynch law. Few Americans feel any shame at standing with China, Iran and Saudi Arabia in the league of grotesque punishments. They execute fellow citizens as they bomb foreigners, to demonstrate state potency in a lawless world. Power lies in the sheer primitivism of the killing. Capital punishment is supposed to be part retribution and part deterrent. Its arch proponent, President Bush, is no penologist. He declared on Monday that the execution was a reckoning, yet one that cannot balance the stakes, and is not meant to do so. It is surely meant to do just that. In Judaic law, the reckoning is indeed a balancing of stakes, an eye for an eye. And two can play the same game. McVey claimed his killings as a reckoning for the unpunished killings by state agents of innocent children at Ruby Ridge and Waco. Over here in Europe, governments stand four square against capital punishment. They worry that so confident a nation as America should need to rest in the knowledge that there has been a reckoning. The European Convention on Human Rights is unequivocal. Execution is cruel and unnatural punishment. The homicide expert, the late Mary Tuck, held that the inclination to kill was relatively constant over recent time on both sides of the Atlantic. Most lethal assaults are spur of the moment, committed under the influence of drink or extreme anger. They are wholly unsusceptible to deterrence. Miss Tuck attributed trends in homicide mostly to the changing weaponry available to those communities most prone to violence. Hence the higher rates in gun-toting American cities. I hope the proponents realize that they actually may, in some way, be responsible for Waco and Ruby Ridge. Also, I hope that you will remember this tomorrow when the concealed weapon comes up. The gun culture, and the culture of killing feeds on itself and creates itself. Thank you.

SENATOR BOURNE: Thank you. Are there questions for Mr. Groat? Seeing none, thank you. Appreciate your testimony. Next testifier in opposition.

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JOHN KREJCI: (Exhibit 4) Good afternoon, Senator Bourne and senators. I'm John Krejci, K-r-e-j-c-i. I'm testifying in opposition to LB 506 for the Nebraska Chapter of the National Association of Social Workers. The National Association of Social Workers committed to a belief in the dignity, worth, and value of human life. And following that principle, we obviously oppose the death penalty in whatever form it's administered. We have testified before this committee year after year expressing our conviction that the death penalty should be abolished, and we're going to do that later today. Senator Chambers probably knows most of those by heart. He could recite them for us in all the years. In addition to believing that instituting lethal injection either as the only method of execution or even more gruesome, setting up a situation wherein the condemned are forced to choose his or her own method of being put to death, is barbaric. We are convinced that a state that kills its citizens, by whatever method, teaches its citizens, particularly children, that violence, even vengeance, is acceptable. Last night I read over the bill and I noticed how many times death penalty, sentence of death, punishment of death, inflicting the punishment of death, and carry out the sentence of death are used in the document. Let me just quote a few things. It kind of tells you what the bill says and what it tells us. First page says death penalty, inflicting the death penalty. Page 2, sentence of death, sentence of death, punishment of death, punishment of death, cause death and the application of such current or currents shall be continued until the convicted person is dead. Sufficient to cause death. This is just to me is just really, really ugly. The director of correctional services, we have a new one, has to carry out the sentence. I presume he's thought about that. Written notice given to the person to let him decide what punishment of death. Failure to choose shall result in the punishment of death being inflicted however they choose. Sentence to death. Let's let the warden carry out the sentence of death. Punishment of death. Failure to choose shall result in the punishment of death. It's mentioned 30 or 31 times, punishment of death, infliction of death. And that's just, you know, it says something about this. They say, oh, yes, we can't...that's not going to be a medical professional. We're not going to violate any drug laws but it's just a convicted person, punishment of death, punishment by death. Page 6 is four more times. I won't go on but the point I'm

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making is that, you know, it's really an ugly bill and it talks about death and its focus on death and I would hope that our state would be more life and the good life. We ask you to consider again the inhumane nature of the death penalty in whatever form and we ask you to indefinitely postpone or kill LB 506. Lethal injection is merely an attempt to sanitize state authorized killing. Thank you.

SENATOR BOURNE: Thank you. Are there questions for Mr. Krejci? Seeing none, thank you. Next testifier in opposition?

RICHARD HEDRICK: I'm Richard Hedrick, H-e-d-r-i-c-k. I'm against the death penalty so I'm against this bill. I'm against the state killing other individuals. I do not believe that I should kill for no reason. I have killed to eat. My daughter decided, this is not necessary. She became a vegetarian. I have not gone that far. I still let somebody else kill for me as I do not raise chickens, pigs, or anything that I have to kill. I do not believe the state should kill people in my name. Bush was mentioned. I should not add my opinion about Bush but you know I will (laughter). Bush says that he has some faith. He does not say that he is a Christian or follow Christ. I had an opinion, asked a friend of mine if Christ was an anti-Christ and he went through some rigamarole that I don't understand. And he asked me a few days later, and he thought maybe he was. Christ said not to kill. Bush sent people over to Iraq to kill Iraqis and I believe he's a false prophet if not an anti-Christ. Thank you.

SENATOR BOURNE: Thank you. Are there questions for Mr. Hedrick? Seeing none, thank you. Next testifier in opposition. Are there neutral testifiers? Did you sign in, sir?

STEVE KING: Yes, I did.

SENATOR BOURNE: Thank you.

STEVE KING: Good afternoon, Chairman Bourne, members of the Judiciary Committee. My name is Steve King, K-i-n-g. I'm planning and research manager for the Department of Correctional Services. I appear before you today to present information regarding the method of execution in Nebraska



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and to answer any questions. Rather than read my testimony I'll just present it for your information. It's basically the same, just updated from previous testimony that I presented before this committee in the past. And I'll be available for any questions.

SENATOR BOURNE: Thank you. Are there questions for Mr. King? Seeing none, thank you.

STEVE KING: Thank you.

SENATOR BOURNE: Other testifiers in a neutral capacity? Senator Erdman waives closing. That will conclude the hearing on LB 506. Senator Chambers will now open on LB 760. As he approaches, can I have a show of hands of those here to testify in support of LB 760? I see eight. Those in opposition? I see one. Those neutral? I see none. Senator Chambers.

LB 760

SENATOR CHAMBERS: Thank you. Mr. Chairman, members of the committee, I'm Ernie Chambers. I represent the 11th Legislative District in Omaha and for the past 30 or so years I've brought a bill to abolish the death penalty. And should I not be successful this session I will continue to wage that battle as long as I'm a member of the Legislature. I'm well aware that there are people, for whatever reason, will always think that the state should kill people. Those individuals I will not argue with, I will not try to change their mind, I will not try to persuade them. I do not get involved in long, deep, acrimonious arguments over the death penalty. It's one of those issues which people feel one way or the other about. However, I will continue to try to persuade my colleagues in the Legislature to think rationally about this issue, recognize the fact that elected officials are society's teachers. Whether we want to assume that role or not, it is one impressed upon all of us. One of the best things the Legislature ever did was to abolish the death penalty although the then-governor, Charles Thone, vetoed the bill. Many people said that was the Legislature's finest hour. For once, a group of senators disregarding what is perceived to be overwhelming public support for the state killing people decided that it was not

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a course that this state ought to pursue. That Nebraska as a state is better than that, that the public officials who make up the Legislature, at least the majority, would try to help show how the state can be better than that. If there is a death penalty in place and no death sentence is ever pronounced or ever carried out, those who support the death penalty are satisfied. They don't care just so it's there. There is no other punishment for any offense which would be considered a valid punishment if it were seldom, if ever, carried out. And if the majority of the people who committed the offense for which the punishment had been established would not suffer that punishment, the death penalty is outmoded. It is impractical, it is extremely expensive in terms of dollars. The problems it creates for the family members of victims, the family members of the perpetrator. If the death penalty were to be abolished and this bill would be adopted to do that, the person would be sentenced if he or she were convicted of first-degree murder to life without possibility of parole. And a requirement for restitution should the inmate be in a position to provide that. There is language which establishes that as far as the power the Legislature has to set conditions for parole, the Parole Board would be prohibited from ever paroling a person under a sentence of life without possibility of parole. Obviously, the Legislature cannot do anything to take away the power of the Pardons Board to pardon and it should not do that. It should not be able to do that. So, in effect, this bill would cut out a lot of expense to the state, multiple trials, appeals, overturnings, resentencings, on and on which, in the real world, do occur as the rule rather than the exception. It is extremely cruel to keep somebody on death row for 15 to 20 or more years and finally get around to the point where you can kill that person. A society which considers itself civilized and which professes high religious, moral, and ethical principles should not be willing to engage in such uncivilized, psychological torture and barbarism. We know that those who are wealthy, who are politically powerful or socially well-placed will never face the death penalty, never be charged with a capital offense and even in the case of most homicides the possibility of a plea bargain is there. Consequently, despite the hundreds of homicides that have occurred in this state, a relatively small handful of people are on death row and most of the people who have left death row who had been sentenced there, left not through

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execution but in some cases through natural death and others, through court action. I'm not going to take any more time. I know my time is almost up. I hoped to take less time than I did, to leave as much for those who came to testify as possible. Nevertheless, I will answer any questions that you may have.

SENATOR BOURNE: Thank you. Questions for Senator Chambers? Senator Foley.

SENATOR FOLEY: Thank you, Chairman Bourne. Thank you, Senator Chambers. Despite our differences in height, occasionally you and I do see eye to eye (laughter) on an issue (laugh) and this is, of course, one of those instances. And I just want you to know that I appreciate the fact that you've offered this bill not only today but over all the years that you've served here, you've offered this bill time and time again. And we can't quite seem to get it done but maybe that day will yet come while you and I are serving here (laugh) together. But I do want to ask you a serious question and some people might regard this as being needlessly provocative. I'm not trying to be provocative but it's a question that I've asked myself. Many people have been curious about this. If we can offer legislation to give protection to the convict on death row, why is it so difficult to offer legislation that would give protection to an unborn child?

SENATOR CHAMBERS: Because when it comes to that issue, I think it's up to the woman to determine whether she'll carry a pregnancy to term. And my point of view on that matter is that of the woman, not a fetus. All rights redound to the benefit of the woman so until the fetus is born into the world as a separate and independent being, the woman is the one that I'm interested in, the one that I'm concerned about. And I will always support the right of the woman to make that decision. I don't think the state has any right to intrude into that very personal decision and area. I do not think society as a whole should claim to have an ownership right to a woman's body or her womb and make dictatorial statements about her set of circumstances. So although I find no fault with people who want to condemn abortion as a sin, I will never vote to make it a crime if it's a choice of the woman. If the state were to compel abortion I would be more rabid in opposing that than you are

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in opposing abortion but as long as it's a matter of choice, it's the woman's and hers alone.

SENATOR FOLEY: But if I can continue on this same line, even those instances where it's a third party who's interrupting that pregnancy and killing the unborn child, you've resisted legislation even in that instance.

SENATOR CHAMBERS: Right. Because, again, I want the woman to receive any extra protection because the attack is made against the woman. Incidentally, it may affect a fetus so I always am looking at the person in esse, as they say in philosophy, e-s-s-e, the one in being. That is the woman. Once a child comes into the world, that child is a full-fledged human being and I probably am one of the strongest people in the Legislature in seeking legislation and other provisions to protect children and see to their welfare. So I think it's one of those issues again where we will never see eye to eye even were we exactly the same height (laughter).

SENATOR FOLEY: And I don't want to take more of the committee's time but I appreciate your entertaining those questions.

SENATOR CHAMBERS: And I'm not offended by the question. It is a legitimate one and I'm glad it was asked forthrightly.

SENATOR FOLEY: Thank you.

SENATOR BOURNE: Further questions for Senator Chambers? Seeing none, thank you.

SENATOR CHAMBERS: Yes.

SENATOR BOURNE: Would the first proponent come forward? And those also here to testify in support of this bill even if you've signed in on another measure, we're going to ask that you sign in on each individual bill that you plan on testifying so as the on-deck area becomes open please make your way forward and sign in to expedite the hearing. Welcome.

ERIC ASPENGREN: (Exhibit 9) Senator Bourne, Senators of the committee, I was just here a couple of minutes ago but I'll

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say my name and I didn't spell it last time so I'll spell it this time. It's A-s-p-e-n-g-r-e-n. My name is Eric Aspengren. I am the executive director of Nebraskans Against the Death Penalty. Nebraskans Against the Death Penalty was founded in 1981 after Governor Thone had vetoed a bill passed by Nebraska's Unicameral that would have repealed the death penalty in Nebraska. Since its founding, NADP has been a politically active organization and we supported the death penalty abolition efforts in the Nebraska Legislature. NADP currently has over 1,800 contributing members and a mailing list of over 10,000 individuals who have indicated to NADP that they support death penalty abolition in Nebraska. We have members in every county in the state and I do believe every district in the state. With such a broad membership base, you can guess that our members have different reasons for opposing the death penalty. I would like to briefly list off a few of those reasons. You will likely hear more details concerning these opinions later on in this hearing from other testifiers. The state has a responsibility to mete out justice in an equal and fair manner. Unfortunately, given the imperfections inherent in human behaviors, this does not happen in all cases. It is unfortunate that that is the case. Given these mistakes, based on economic, racial, and even geographic biases have been made and will likely continue to be made and given that any mistakes in death penalty cases cannot be remedied after the punishment is meted out, we cannot support the death penalty. Given that mistakes can happen when investigating and prosecuting any crime we run the risk of an innocent person being sentenced to death. While there is no evidence that this has happened in Nebraska, it seems that there is no guarantee that it may not happen in the future. And as I said before, there is no remedy for that mistake once the sentence of death is carried out. It is also argued and you will likely hear this argument later on today, that the death penalty deters murder. Of the myriad studies that have been done on this issue, not one credible study has proven this, not one. In fact, states without the death penalty are generally among those with lower murder rates. As an example, the state of Iowa, our neighbor to the east, has not had the death penalty since the early sixties. Their murder rate, per capita, is almost half that of Nebraska's. The costs of the death penalty are enormous. My organization has recently begun a study of the costs specific to Nebraska. But other

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states such as California have found the costs to be in the millions per execution above the costs of life without parole. But the overwhelming motivation of our membership's opposition to the death penalty is a respect for life and that the taking of a life is wrong. Whether that taking of a life is done by an individual or a state, it is still wrong. Thank you. I would be glad to take any questions you may have.

SENATOR BOURNE: Thank you. Are there questions for Mr. Aspengren? Seeing none, thank you. Next testifier in support. (See also Exhibits 7, 8)

MICHAEL RADELET: (Exhibits 10, 18) Senators, Michael Radelet, R-a-d-e-l-e-t, the University of Colorado. In the 25 years that I've been doing death penalty research, I've published books on issues such as executing the innocent, executing the mentally ill. I did the study for Governor Ryan in Illinois on race and death sentencing to be used to commute the death sentences there. I'm also a member of the board of directors of a Colorado group called FOHVAMP, Families Of Homicide Victims And Missing Persons which is a group of families in Colorado where a loved one has been murdered and the murder has not been solved. I just wanted to go over some developments in death penalty worldwide in the last year so that we can put today's discussion into proper cultural and historical perspective. In April of 2004, Amnesty International released its most recent report on the death penalty around the world. They found that four countries accounted for 84 percent of the executions in the world: China, Iran, Vietnam and the United States are the top four. In the last three months I've been to both Vietnam and to China, meeting in Vietnam with the administrative cultural affairs and in China with about 150 members of the Chinese Academy of Sciences where everybody agrees that the death penalty in those two countries will be increasingly restricted in the next few years, if not abolished. There are very few issues involving human rights where the United States is in the same bathtub with Iran, China, and Vietnam. In May of 2004, the latest Gallup Poll came out on the death penalty. They found support for the death penalty has dropped rather precipitously in the last few years to the point now where 50 percent of Americans voice support for the death penalty; 46 percent support life without parole. It's basically

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within the margin of error. This is not an issue as it was 30 years ago, 20 years ago like Mickey Mouse and apple pie where everybody vociferously supported the death penalty; Americans are really split on this. In June of 2004, the New York Court of Appeals threw out the New York death penalty statute. That statute was enacted in 1996 when Governor Pataki ran on a pro death penalty platform. It's now widely acknowledged in New York that the Legislature will not reenact a new death penalty statute. In December of 2004, Senegal abolished the death penalty, thereby becoming the 118th country around the world to abolish the death penalty. Only 21 countries last year executed people. In December of 2004, my old home state of Florida recorded its ninth death sentence in the year 2004, nine per year. They've done that for each of the last three years. Between the period of 1980 through the mid-1990s they were sentencing 40 people a year to death so death sentencing rates in Florida have dropped by three-quarters. In February of 2005, a new ABA study found all sorts of problems with quality of counsel in death penalty cases. In February of 2005, our neighbors to the south in Kansas decided not to vote on a proposal to fix their death penalty statute. The state Supreme Court in Kansas had thrown out the death penalty last year and so that effectively means that Kansas joins those states who have abolished the death penalty. February 28, just a couple of weeks ago in New Mexico, they passed a bill to abolish the death penalty in the House by a 38-31 vote. That bill was later tabled in a Senate committee but it's interesting that it passed by a rather large margin in the House. There have been several other activities and events over the past year in the United States and internationally and all point to a very rapid decline in death sentencing support, a decline in executions, and a movement towards abolition.

SENATOR BOURNE: Thank you. Are there questions for Dr. Radelet? Senator Chambers.

SENATOR CHAMBERS: Dr. Radelet, I'm not going to draw this out for any long period of time because there are people who want to testify but I want to take a little advantage of your expertise if you will indulge me. Has any study been undertaken to determine that in those places where such as Florida or some of the recent abolition instances around the world that there has been a significant increase in the

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number of crimes that would have carried the death penalty?

MICHAEL RADELET: There have been a number of studies that have looked at homicide rates both in times when the death penalty has been abolished and when it's been enacted. Also, homicide rates relating to the frequency of executions such as a state like Texas that frequently uses it compared to a state like California that doesn't. And also compares homicide rates in states with the death penalty and states without. The overwhelming majority of those studies have concluded that the death penalty never has, does not, and never will have a greater deterrent effect than life imprisonment without parole. And in this context, it's interesting to note that since 1977 there have been 950 executions in the United States; 102 of those people, 12 percent, gave up their appeals and asked to be executed. That is, they'd rather be dead than have life without parole so to the degree that the deterrent effect of the death penalty is a function of the severity of the sentence, we have 12 percent of those being executed not only thinking that life in prison is too harsh of a punishment but also having the hudsba or the guts to stand up and say, okay, I do want to be executed, and they prefer death to life without parole. We did a study in 1996 where we surveyed the hundred top criminologists in the United States. And 90 percent of them, regardless of their position on the death penalty, 90 percent agreed that the death penalty, according to the research that's been published, did not have a superior deterrent effect to life without parole. It's kind of like if you want to deter people from leaning on your stove, medium heat works just as well as high heat.

SENATOR CHAMBERS: It has been...may I ask a question, Mr. Chairman?

SENATOR BOURNE: I thought you were in a dialogue?

SENATOR CHAMBERS: Oh, okay (laughter). But I didn't want to just ramble without...

SENATOR BOURNE: Oh, I appreciate that.

SENATOR CHAMBERS: Okay. Professor, there has been a reference to...and I know the answer to the question but I'd like it in the record from somebody who might can give a



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relatively recent example. The cost of actually executing a person, sometimes when you don't succeed in carrying out the execution but going through the steps to bring a person to the point of being executed costs more than to imprison a person for life. Are you aware of such studies having been undertaken and arriving at that conclusion?

MICHAEL RADELET: Yes.

SENATOR CHAMBERS: How could that be?

MICHAEL RADELET: Okay. The most recent study was published two weeks ago by the Los Angeles Times. They did a detailed study of the cost of the death penalty in California and concluded that each of the 11 executions in that state had cost a quarter of a million dollars. So, sorry, quarter of a billion, \$250 million on average for each of their 11 executions. There have been studies done by legislators, by state Supreme Courts, by academics, by newspapers, pro death penalty newspapers, antideath penalty newspapers, and every one of these studies has come to the conclusion that the death penalty is several times more expensive than life imprisonment without parole. Basically, the reason for that is that lawyers cost more than prison guards. If a person is executed, she or he will still be on death row for 15 years before the execution is carried out so we have to pay for those costs. And life without parole, by the way, is defined as usually 40 years, the average age of conviction for first-degree murder is 28 and life expectancy in prison is a little lower than in the general population. Death penalty cases, as we all know, tend to be very prolonged. Any attorney worth their salt is going to challenge every aspect of the law. I was in a hearing in Georgia once where they challenged the Georgia state flag. It had a confederate symbol but that took a week of hearings in the court. I did a survey once of the justices of the Florida Supreme Court and asked them, what proportion of their time they spent on death penalty cases, and the average was 40 percent, 40 percent of their time. So what that means is that anybody who wanted to sue somebody else for a car crash or something, all their cases get shoved back because the state Supreme Court was spending so much time on death penalty cases. So even in a state like Texas, that does not supply adequate defense services or counsel, the death penalty tends to consume much, much more than life

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without parole. And that's why so many families of homicide victims are opposed to the death penalty insofar as a big pro death penalty argument is that we need to help families of homicide victims. You know, who can argue with that? The argument goes is that if we sentenced all these people to life without parole and used just a fraction of the cost savings we could fund many, many more effective ways to help families of homicide victims.

SENATOR CHAMBERS: That's all I would have. Thank you.

SENATOR BOURNE: Further questions? Seeing none, thank you.

MICHAEL RADELET: Thank you.

SENATOR BOURNE: Appreciate your testimony. Next testifier in support.

ALAN PETERSON: (Exhibit 11) Chairman Bourne and members of the Judiciary Committee, I'm Alan Peterson, A-l-a-n P-e-t-e-r-s-o-n. I'm a lawyer. I've been a lobbyist for about three decades for the news media, the nuclear waste compact, and various other clients. I'm a trial lawyer and I have been involved because I've been appointed in defending death row cases for about two decades. I speak here not for any client but for myself and I simply wish to offer my views, my thoughts and my experience and, of course, my recommendation that you pass this bill. I ask and I know it's hard because we've been here so many times before on this issue, even on this, almost this very same bill. I ask for your fresh ears for my two, three minutes as if we hadn't because things are changing and it is now time that this is not a charade or a ritual but that we really take a look at getting rid of this pointless and violent legal part of Nebraska. I want to talk briefly about where we've come from in the last couple of years, what's brand new which is the Roper v. Simmons case of two weeks ago in the U.S. Supreme Court and why it's important. This Legislature courageously passed a moratorium bill to take a look at the arbitrariness in our own state, if there was any. It was vetoed and, in part, the Legislature overrode the veto in 2001, I believe, approximately, 2000 perhaps, and financed a study led by Professor Baldus and several other people worked on it to find out, do we have an arbitrariness problem? The conclusion was, perhaps not a

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racial bias situation, at least the study was not able to prove that. But definitely a difference in how people are treated because of their socioeconomic status. We've had no action as to that. The studies, I was going to mention...Professor Radelet has mentioned, deterrence doesn't happen. Then why are we doing it? Pure revenge? And if the revenge is arbitrary, would any one of you even if you love the death penalty, want it to happen in our state? I don't think so. The other thing that's new is Roper. Two weeks ago, the Supreme Court of the United States, opinion by Justice Kennedy, usually a conservative, said, we look to the state legislatures to see where the level of decency is in death penalty matters. They're the number one meter of where the minimum decency for our country's legal system comes. And it's the only legal place where I know that happens. Legislatures have to act if we're going to do anything about a problem; you can't wait on judges. Secondly, he said, we look at the world too. I ask to the extent I've got any credibility, that you trust my judgment, my integrity, from the experience you've had with me or known of me. I want to put that behind a request that now we move this bill. It may have to pass this year or next. Let's move it. Let's get rid of this nonsense. Let's bring Nebraska above the minimum level of decency. Let's not be last. Thank you very much.

SENATOR BOURNE: Thank you. Questions? Senator Chambers.

SENATOR CHAMBERS: Mr. Peterson, you may not want to answer this question. It might be going into an area that it is not even appropriate for me to ask it but is there a toll that has been taken on you during the decades that you have handled death penalty cases?

ALAN PETERSON: Probably every trial takes a little piece out of a trial lawyer. Death penalty cases take a big piece but I'm not about to quit any more than you would.

SENATOR CHAMBERS: You anticipated my question (laughter). Thank you. Okay.

SENATOR BOURNE: Further questions? Senator Combs.

SENATOR COMBS: I was just reading through some of the materials. It said sometimes that people that are defense

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attorneys are not really prepared well to defend the client and the people are not getting a fair shake. Have you seen that happen in Nebraska?

ALAN PETERSON: Yes, and I think the study of Professor Baldus indicated that one of the good things about being in the top, the up-trodden rather than the down-trodden part of our society, if you kill somebody you are far more likely because of your resources...attorneys, experts, whatever, not to get the death penalty. Perhaps not even to be convicted but the study was, it makes a huge difference. Not that we don't have terrific public defenders, at least in the heavily populated areas but that study also said across the different regions of our state there is an inequality in the kind of defense and in the numbers of people given the death penalty. The politics are different. The available resources are different. So the answer is yeah. That was one of the arbitrarinesses that the study you paid for found.

SENATOR COMBS: I really like to watch court TV and all the things that are at the cutting edge of forensics and DNA and the things that have really started to happen the last five years as far as exoneration of people on death row through modern technology that are, you know, essentially being fried and hanged, whatever, that are innocent. Has that ever happened in Nebraska so far?

ALAN PETERSON: To my knowledge, there's one case that's probably close to a hundred years old where great doubt of the guilt was found after the person had already been killed. Nothing recent. I personally don't know of anybody on death row who I believe is innocent of the killing. I do think there are some death penalties that were imposed years ago like the client I currently represent 26 years ago. Where now that penalty would not be imposed for the same crime under the same circumstances. This is evolution of decency and, again, I hope we don't have to be last to recognize it.

SENATOR COMBS: Thank you.

ALAN PETERSON: Thank you, Senator Combs.

SENATOR BOURNE: Further questions? Seeing none, thank you.

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Appreciate your testimony.

ALAN PETERSON: And thank you, sir. Thank you, committee.

SENATOR BOURNE: Next testifier in support.

JIM CUNNINGHAM: (Exhibit 12) Senator Bourne and members of the committee, good afternoon. My name is Jim Cunningham spelled C-u-n-n-i-n-g-h-a-m. I'm appearing in my capacity as executive director of the Nebraska Catholic Conference in support of LB 760. The conference is a state level association that represents the mutual interests and concerns of the Catholic Archdiocese of Omaha and the dioceses of Lincoln and Grand Island on matters involving public policy under the direction of the diocesan bishops. There was a time not that many years ago when the Catholic conference did not appear in support of this bill, did not take a position in support of this bill. And that goes, I think, to the fact that Catholic teaching does not condemn the death penalty in principle. It's not regarded as intrinsically immoral. Public authority has a legitimate purpose in punishing criminals and the right and duty to defend human lives against aggression and to do what is necessary to protect public order and the safety of persons. And this does not in principle exclude recourse to the death penalty. However, there has been a development of Catholic teaching over the years. There's an important caveat on the imposition of the death penalty according to Catholic teaching. And that is, that if nonlethal means are sufficient to defend and protect the public order and safety then public order must limit itself to such means as these are more in keeping with the concrete conditions of the common good and more in conformity with the inherent dignity of the human person. There's been a development over the last decade and much of that is due to the energetic and clear teaching efforts of Pope John Paul II. In his important encyclical, The Gospel of Life, the Pope formulated a standard for application of the teaching, a public policy test for the death penalty, if you will. And that test is this. Is the death penalty absolutely necessary? That is, are there no other means to defend against aggressors, preserve public order and protect the safety of individual citizens and families? In analyzing this question of the death penalty from his worldwide perspective, the Pope himself responded that the cases of

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absolute necessity are extremely rare if not practically nonexistent. In analyzing this issue, the Nebraska Catholic Conference has in its collective judgment found that the response to the test of whether the death penalty is absolutely necessary is unambiguously no, of course not. The death penalty fails this rational, reasonable test. In this modern, technologically sophisticated age, in this developed society, means other than the death penalty are sufficient; the necessary conditions do not exist to justify its use. And I've submitted extended comments and testimony for the record. And I'll let those remarks then stand as my oral testimony. Thank you.

SENATOR BOURNE: Thank you. Are there questions for Mr. Cunningham? Seeing none, thank you. Appreciate your testimony. Next testifier in support. If there's other testifiers in support...oh, they're making their way forward. Thank you.

CRAIG GROAT: Craig Groat, G-r-o-a-t. The campaign to abolish the death penalty is gaining ground worldwide including in the United States. Despite the belligerent tone adopted by some leaders after the September 11 attacks, (inaudible) Sister Helen Burjean (phonetic) it said here Tuesday. According to Burjean, over the past five years in the United States, whenever opinion polls have offered life imprisonment as an alternative to capital punishment, support for the death penalty has fallen below 50 percent as have all the studies recently shown. This is from Agence France Presse. It is probable that there is not a civilized person who can read without nausea the account of a capital execution. However, it may be remarked that the details of an electrocution are not less revolting. There is no crowd. There is no spectacle and no blood is shed. Everything takes place in private with great neatness but in analyzing the sensation undergone, one asks whether the neatness of the system is not one of the details that render it abominable. This would equally apply towards lethal injection. This is from the International Herald Tribune. America and Europe are land masses apart by both the Atlantic Ocean and enthusiasm for the death penalty. Americans who travel in Europe whether as tourists or ambassadors marvel at the frequency with which they are called on to defend the American legal system's reliance on capital punishment. At least among European elites the

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death penalty has become an even stronger metaphor for America since the nation is led by a man who presided over 40 executions in 2000 alone. The United States in its belief that execution is appropriate punishment stands nearly alone in the community of democracies. Felix Rohatyn, ambassador to France during the Clinton administration says that every time they gave a speech French audiences asked him to defend America's use of the death penalty and was usually the first question asked. European politicians and intellectuals view the death penalty as a humans rights issue are incredulous that Americans' support for a punishment that fails to deter crime targets mainly those that cannot afford a decent lawyer is used on the mentally retarded and has often gotten the wrong man. America's high execution rate stands in striking contrast to its history of respect for individual rights and its role as an international champion of human rights. The death penalty is becoming a diplomatic impediment for Washington. Some European countries will not extradite suspected murderers to America. Capital punishment would be one reason why Washington's European allies voted against American membership in the United Nations Human Rights Commission. Today the European union will admit no country with a death penalty. It was abolished in Germany and Austria and Italy right after World War II. Later other European nations gradually abolished it and signed international treaties which make it unlikely the death penalty will be revived there in the foreseeable future. America was shaped by a frontier culture and an emphasis...okay, thank you.

SENATOR BOURNE: If you'd like to conclude your thought, Mr. Groat, that would be fine.

CRAIG GROAT: Okay, I appreciate that, and an emphasis on individual accountability. We endorse longer sentences than European nations which stress rehabilitation and not punishment. A recent Gallup poll showed that American supporters of the death penalty do not believe it deters crime. Almost half of those fold believe in the justice of an eye for an eye and endorse execution as social vengeance. That view is anathema among Europeans' parliaments. In our reliance on capital punishment, America stands apart from the other progressive democracies. Thank you very much.

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SENATOR BOURNE: Thank you. Are there questions for Mr. Groat? Seeing none, thank you.

CRAIG GROAT: This was from the New York Times.

SENATOR BOURNE: Thank you.

CRAIG GROAT: Thank you very much.

SENATOR BOURNE: Next testifier in support?

LEOLA BULLOCK: (Exhibit 13) Mr. Chairman,...

SENATOR BOURNE: Welcome.

LEOLA BULLOCK: ...my name is Leola J. Bullock and I speak today on behalf of the NAACP, Lincoln branch, which has a long tradition of...

SENATOR BOURNE: Could you spell your last name for us? I'm sorry.

LEOLA BULLOCK: Bullock, B-u-l-l-o-c-k.

SENATOR BOURNE: Thank you very much.

LEOLA BULLOCK: Um-hum. We have a long tradition of opposition to the death penalty in all its guises. For the record, the NAACP stands firmly against lethal injection and all methods of capital punishment. The NAACP strongly supports LB 760 and all actions to abolish capital punishment all together. The NAACP is proud to stand with its sister and brother organizations and individuals against the death penalty. Much has been said and much has been written about capital punishment since its reinstitution in the United States in 1976. There is not much that is new that can be said. Therefore, I will merely and briefly, but importantly, reiterate three points that the NAACP has said before on this matter. The death penalty is inherently illogical, immoral, and unjust. And lethal injection cannot make it less so. To kill in order to show that killing is wrong defies common sense. It turns logic upside down and inside out. Not surprisingly, those states that have the highest execution rates, and most are in the south, also have the highest murder rates. State sanctioned murder, by



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whatever method, does not deter murder. Killing merely begets more killing. This is the simple, irrefutable logic of killing. The death penalty is immoral. Nearly all religious denominations oppose and condemn capital punishment. States should not and ought not to play God. Among western democracies, the United States is the only country that still engages in capital punishment which has been stated before. The death penalty is unjust. Since 1976, when the death penalty was reinstated, over 870 persons have been executed in the United States while over 119 death row inmates have been set free following proof of their innocence. In other words, for every eight persons who have been executed, one has been set free, unjustly convicted and condemned. Does anyone really believe that we have not, and will not in the future, execute innocent persons? The proponents of lethal injection, most of whom are also supporters of capital punishment have or so it seems but one argument to make. They contend that lethal injection will make the death penalty more humane. But the idea that the death penalty can be made more humane is more than a mere linguistic contradiction. The application of the death penalty has been shown time and again to be fundamentally flawed. It is bound by racism whether the participants in machinery of death are white or black; by placism, whether one lives in Nebraska or across the river in Iowa; and by classism, whether one is rich or poor. Lethal injection cannot make an inherently flawed and barbaric practice more humane. The NAACP remains steadfastly committed to common sense, morality, and justice. The NAACP therefore strongly opposes lethal injection and calls upon this Legislature to abolish capital punishment. Thank you.

SENATOR BOURNE: Thank you. Are there questions for Ms. Bullock? Seeing none, thank you.

LEOLA BULLOCK: Thank you.

SENATOR BOURNE: Next testifier in support?

JOHN KREJCI: (Exhibit 14) Good afternoon again. My name is John Krejci, K-r-e-j-c-i. I represent the Nebraska chapter of NASW. I won't read my testimony. Based on the principle of the value that social workers give to life, death penalty does not respect that. I quote the principle, the statement

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of the National Association of Social Workers, repeats those arguments against the death penalty. It doesn't deter. Most modern industrial societies don't have it. It's perhaps cruel and unusual punishment and it really hits low income and minority peoples harder so those are the reasons. There's a whole bunch of economic, psychological, and political reasons also. What I'd like to pick up on is what Senator Chambers said and Mr. Peterson said with regard to the death penalty. It is such a legal morass that, you know, why don't we just get rid of it because it's not going to...we're probably not going to ever execute anybody in Nebraska. The metaphor I'll use is...it's like the death penalty has Alzheimer's disease. All those ganglia are all tangled, legal ganglia are tangled up. And the electrical current of the electric chair is not even going to go through those synapses so it's really so gummed up and thanks to Senator Chambers for having it gummed up (laughter) and if he can gum it up more I, you know, more power to you, Senator (laughter). The wisest and simplest course to abolish the death penalty is to replace it with life without parole. And so we would like to see LB 760 advanced and passed.

SENATOR BOURNE: Thank you. Are there questions for Mr. Krejci? Seeing none, thank you. Next testifier in support?

STEVE LARRICK: Good afternoon, Senator Bourne and members of the Judiciary Committee. I'm Steve Larrick, L-a-r-r-i-c-k, and I am here to speak on behalf of the Nebraska Green Party and also of the Lincoln Chapter of the United Nations Association. And I'd like to talk a bit about the international standards of human rights that are moving forward around the world to reduce the number of executions around the world and efforts of the community, international community around the world again to eliminate the death penalty. And I'll read some from the report, 1996 report to the General Assembly of the United Nations on human rights questions. And I'll focus on international standards regarding state executions. In this report, they talked about how throughout the United Nations, the various agencies they worked very hard to try to eliminate the death penalty as inhumane treatment of human beings. And they talked about how in Europe the death penalty has been abolished and any new member country seeking to join the

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council of Europe or they're required to sign within one year and ratify within three years the sixth optional protocol to the European convention and are also required to place a moratorium on executions immediately thereafter. So that's kind of the trend of modern industrial societies is to get rid of the death penalty. And only a few countries are expanding the use of the death penalty and the United States is among them. And even going beyond...the U.S. even goes beyond some of the other countries that have the death penalty and are expanding the number of crimes that call for the death penalty or allow a death penalty including economic and drug related offenses. And so as the Green Party and as the United Nations Association here in Nebraska, we feel this is not where we would like to see the United States to be because we know that the state can make mistakes and we've seen that in the invasion of Iraq. This was a country that was invaded on the basis of weapons of mass destruction that did not exist. And on the basis of links between Saddam Hussein and Al Quaida that were found to be false. And this is resulting in tens of thousands of deaths and with no end in sight. And this shows that the state is not always perfect and should not be taking on the role of executing people or creating wars and violence without...well, we believe that we need to move toward a world without violence as a tool of state policy. And so we would hope that you would support Senator Chambers' bill and move Nebraska into a higher level of social understanding and more peaceful society. Thank you very much. Do you have any questions?

SENATOR BOURNE: Thank you. Are there questions for Mr. Larrick? Senator Friend.

SENATOR FRIEND: Thank you, Senator Bourne. Mr. Larrick, are you with the Green Party, are you tied or do you have friends associated with the Green Party currently in Florida?

STEVE LARRICK: I don't...

SENATOR FRIEND: State of Florida?

STEVE LARRICK: ...I don't think...I went to the Green Convention last year in Milwaukee but I don't know that I met anybody from Florida.

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SENATOR FRIEND: I was just curious. They're going to pull the feeding tube out of a woman there on Friday.

STEVE LARRICK: Um-hum.

SENATOR FRIEND: Just kind of curious what the Green Party thought of that situation down there.

STEVE LARRICK: A good question. You know, I don't know that we have an express policy on euthanasia and people being allowed to die by their choice. Oh, well, maybe, you know, maybe that's an unconscious person that...and other people are making the choice.

SENATOR FRIEND: Oh, it's a fairly unconscious person, sure. Thank you.

STEVE LARRICK: Okay. No, I don't know the policy on that.

SENATOR BOURNE: Further questions? Seeing none, thank you.

STEVE LARRICK: Thank you.

SENATOR BOURNE: Next testifier in support?

VIRGINIA WALSH: (Exhibit 15) Senator Bourne, other Judiciary Committee members, ladies and gentleman, my name is Virginia Walsh, W-a-l-s-h. I live in Legislative District 9 in Omaha. I am a member of the state board of Nebraskans for Peace and appear today on behalf of that board to testify for LB 760 to replace the death penalty with a maximum sentence of life without possibility of parole. The first priority for Nebraskans for Peace in 2005 is to reduce the culture of violence in which we live in this state. We call the program Turn Off the Violence. We oppose the death penalty because it is an example of official state sanctioned violence, a situation in which the state of Nebraska acting officially and with agonizing premeditation kills a person. We find this policy of our state to impose premeditated death to be barbaric and appalling. How can citizens work for a reduction in violence when our state itself engages in savagery of this sort? I believe that one of the reasons legislators has thus far sanctioned state killing is that they are possibly

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unaware of the hideous realities of implementation of these sentences. They cannot, of course, perceive the terror within the condemned person as his or her death date approaches. And it is this long, slow desperation and panic which is the greatest cruelty, I think we can agree. But legislators also may often be unaware of just the physical process itself, the moving of the condemned to a death watch cell, the ordering of a last meal, the saying good-bye to all relatives and friends, The last prayers, et cetera. It also seems surreal when witnessed. They seem as if we could not be doing this. We could not be doing this. I stood outside the Nebraska Penitentiary during the executions of Willie Otey and John Joubert and I thank Chambers because I think I saw him there too. And he was coming out of the penitentiary and just watching from out there, knowing our state was deliberately killing someone already kept in a concrete and steel cage was horrifying. Why need we do this? I ask you, why it is not sufficient to keep dangerous persons in cages in order to protect society. If the safety of our society is our legitimate goal, society would be protected by that means. We know now that the claim of deterrence is spurious. The financial cost is less; the suffering is less. The example of the state in availing itself of the least restrictive solution is better. It is hard to escape the conclusion that those who support the death penalty do so out of a love of violent vengeance and I find that if done knowingly, worse than brutal. I implore this committee to set an example of maturity, humanity, and restraint by advancing LB 760 to the full body and supporting it there.

SENATOR BOURNE: Thank you. Are there questions for Ms. Walsh? Seeing none, thank you.

VIRGINIA WALSH: Thank you, Senator.

SENATOR BOURNE: Next testifier in support?

FRAN KAYE: Thank you, Senator Bourne and members of the committee. My name is Fran Kaye, K-a-y-e. I'm a professor at the University of Nebraska. I teach Canadian studies at the University of Nebraska and through Fulbright and other international educational exchange programs I have taught American studies at the University of Calgary in Alberta, Canada, and at the University of Montreal in Quebec, Canada.

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I was teaching at the University of Calgary when Nebraska brought back the death penalty. One of the most shocking things to my students in Calgary was that I came from a state where people had actually executed someone. I put up some of the news clippings about that execution on my door. It resulted in the Amnesty International chapter at the University of Calgary deciding to adopt Nebraska's death row prisoners because there were just simply shocked to have someone from a place that would do that among them, teaching them, and they wanted to do something about what was happening back in Nebraska. My students here often correspond with e-mail with students at the University of Calgary or with other university students in Canada. Again, one of the most shocking things for Canadian students and for Canadians in general is that Americans still practice the death penalty. This comes up over and over again. I don't mind being embarrassed but I would rather be embarrassed by something that I could at least be proud of. I am not proud of representing America as a Fulbright scholar abroad when I have to say that I come from a state with the death penalty. It embarrasses the United States. Calgary, Alberta is one of the most conservative cities in Canada. Its newspaper recently had the lead editorial strongly against the death penalty in relation to someone in Canada being found not guilty for a murder he had been convicted of. What the paper said would have happened had he been in America. He'd be dead. Think about how bad we would all feel. That's true. We cannot avoid...if we are going to have a death penalty eventually we will execute innocent people. We do not deter with the death penalty. Canada has a much lower murder rate than the United States, although the crime rate is about the same. When Canada abolished the death penalty the murder rate actually went down in the years immediately after the death penalty was abolished. The death penalty makes our society more dangerous and embarrasses us abroad. I strongly support LB 760 and I thank Senator Chambers for once again introducing it. Thank you.

SENATOR BOURNE: Thank you. Is it Dr. Kaye?

FRAN KAYE: That's fine or Ms. or Fran.

SENATOR BOURNE: (laughter) Are there questions for Dr. Kaye? Senator Flood.

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SENATOR FLOOD: Thank you, Chairman Bourne. Dr. Kaye, thank you for your testimony. Is it your testimony today that the death penalty actually makes us more dangerous as a country?

FRAN KAYE: Oh, yes, definitely.

SENATOR FLOOD: Explain that for me.

FRAN KAYE: We say as a country that if you dislike what somebody does enough, it's okay to kill them. That...

SENATOR FLOOD: What data do you point to or what studies do you look at?

FRAN KAYE: All the studies comparing Canada and the United States. Canada's murder rate...Canada's crime rate is very similar to the U.S., even violent crime rate. But the murder rate is so much lower. If you look at any of the European union countries their murder rate is so much lower.

SENATOR FLOOD: Is it your testimony that if we do not have a death penalty in Nebraska that murders will go down in this state?

FRAN KAYE: It certainly appears to be the case. That...

SENATOR FLOOD: And what do you attribute that to?

FRAN KAYE: There's not the sense that it's okay to kill somebody. I mean, I...just, you know, I'm a mom. I watch kids. If they think it's okay to slug somebody they're more likely to slug somebody. If they're in a nursery school or something where it says no, no, you don't solve things by hitting people then there's less hitting people. If you say you solve things by killing people there's going to be more killing people.

SENATOR FLOOD: In states that do not have the death penalty, are their murder rates lower than states that do have the death penalty?

FRAN KAYE: For the most part, yes, and I think Professor Radelet can answer that better than I can. He has more of those statistics. I know more about the Canada-U.S. but,

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yes, for the most part that seems to be the case.

SENATOR FLOOD: And what states would you point to specifically?

FRAN KAYE: Iowa would be the major one since we're so similar. We're right across the river from each other.

SENATOR FLOOD: Thank you very much.

FRAN KAYE: Thank you.

SENATOR BOURNE: Further questions? Seeing none, thank you.

FRAN KAYE: Thank you.

SENATOR BOURNE: Next testifier in support.

RICHARD HEDRICK: I'm Richard Hedrick, H-e-d-r-i-c-k. I believe in the Ten Commandments, Thou Shall Not Kill. People who want a huge block of stone put in the courthouse with the Ten Commandments inscribed should be here today. And the people on the right are not consistent. Bush and Chaney tell a hand-picked audience that the only way to handle terrorists are to kill them. The audience yells their approval. Christ lived His life preaching nonviolence. Christ on the cross forgave those who persecuted Him. When I was getting people to sign my petition to run for Lincoln City Council a lady questioned me about the war and Bush's position. She asked, what would I do if a terrorist came to kill my family. I told her that I knew what Christ demanded of me. Christ said that you should not hate your enemies. It would be easier to kill an enemy than it would be to forgive them like Christ demands. I don't know if I'd be strong enough to follow Christ's commandments. We have a problem with killing this last question. People are learning to kill by games. There was more people killed and this individual visualized himself on this game killing police. That was a part of the game, roadkill or something. I'm not sure what the name of it was but he grabbed the gun from one of the police and shot four people before they finally got him. Thanks.

SENATOR BOURNE: Thank you. Are there questions for Mr. Hedrick? Seeing none, thank you. Mr. Hedrick, did you



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forget your book? Next testifier in support. No other testifiers in support? Are there any testifiers in opposition? Have you signed in, sir?

ROBERT KLOTZ: Yes, I have.

SENATOR BOURNE: Thank you.

ROBERT KLOTZ: My name is Robert Klotz, K-l-o-t-z, from Lincoln here. To eliminate the death penalty is to legalize murder. Something is legal if society cannot realistically bring any meaningful penalties against a person doing whatever society does not permit. A person with a mandatory life sentence cannot be forced to do another life sentence after they die so if they kill another person there is no real reason to even bring them to trial other than to psychologically feel good about ourselves that we really showed that bad person a thing or two. LB 760 correctly points out that life is the most valuable possession of a human being which, by the way, would include a fetus. However, the life of a guilty murderer is not more valuable than the life of the victim. Now to place innocent individuals' lives at risk by legalizing murder betrays the grand statement of LB 760 as it compromised the lives of the innocent in order to protect the lives of the guilty. I agree with LB 760 that the experience of this state with the death penalty has been fraught with errors thanks to the Unicameral. Therefore, the resolution of this rests with the Unicameral. However, legalizing murder is definitely not a reasonable solution. What can be done? Number one, do an extreme makeover of the murder laws. If an individual kills someone during a robbery, driving drunk or whatever reason you want then it's first degree murder. However, couple this crime with a witness plus DNA pictures or whatever you want that leaves no doubt in any person's mind that the defendant is guilty of that murder. Then within six months they're executed unless the federal government has some restrictions. Number two, if you cannot produce this sure fire evidence needed for execution of a murder then it's second degree murder with a sentence of life to life, life without parole or whatever is appropriate. Three, anyone while incarcerated that kills another except when self defense can be shown, it is first degree murder. If this state believes life is so precious then put some teeth into the law and fear into the hearts of those who

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would like to walk on the edge because they now know that the penalties to them will be in most likelihood not be as costly as they are to the victim. But at the same time keep in mind that there is a fool born every hour that is oblivious to any law and that trying to come up with a law that will be respected by all is itself foolishness. Now Iowa was considered by two people here, saying the rate is lower. Well, let's face it. If you look at the population age it's an older population. It's more like Senator Chambers and myself, older people. Neither of us would raise a hand against anybody even though maybe we would try to talk you to death but that's as far as that would go.

SENATOR BOURNE: Thank you. Questions for Mr. Klotz? Seeing none, thank you. Next testifier in opposition? Are there any neutral testifiers? Senator Chambers to close. Senator Chambers waives closing. That will conclude the hearing on LB 760. Senator Beutler to open on LR 26CA. All right, Senator Beutler, whenever you're ready. If you want to wait just a minute until the room clears out. All right, Senator Beutler, whenever you are ready.

LR 26CA

SENATOR BEUTLER: Senator Bourne, members of the committee, this is the last of my bills for this year. I don't know who is more relieved, myself or my colleagues, Senator Bourne. My testimony will be very short. And I'm afraid, Senator Aguilar, it's going to be a little legalistic nuance, so bear with me because I assure it will be short. What this bill proposes is a constitutional amendment which is quite simple in concept. The current law says that all civil officers of the state shall be liable for impeachment for any misdemeanor in office. This bill would add, "or for any misdemeanor related to the election by which such officer was elected to the office." I believe that the current provision would include any misdemeanor of which a person was convicted while in office. And you might note that there are a couple of different interpretations of the meaning of "any misdemeanor in office." Does it mean a misdemeanor that was committed while you were in office or a misdemeanor for which you were convicted, or would include a misdemeanor for which you were convicted in office? I believe that it does include the interpretation to include

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convicted while in office regardless of when it was committed. However, even given that interpretation, it would not cover a situation where the misdemeanor is committed before holding office and also convicted prior to holding office. And so in its narrowest sense, that's what the bill would pick up. The term "misdemeanor" has been interpreted by the court in a couple of occasions. It means a misdemeanor in office may consist of a violation of some provision in the constitution or a statute, willful neglect of duty done with a corrupt intention, or negligence so gross and disregard of duty so flagrant as to warrant an inference that it was willful and corrupt. In another place, misdemeanor under this section is a violation of positive statute or a constitution amounting to crime or willful neglect of duty with corrupt intent or gross negligence inferring willful or corrupt intent. But it...although the word "misdemeanor" is used, it would obviously include higher offenses that were categorized as felonies. I want to just take a minute to tell you why I think the current language includes misdemeanors for which a person is convicted while in office. And in order to describe that to you, I have to describe another provision of the constitution so that you can take all of the provisions of the constitution together, and from that get the point of my argument. I have passed out to you another section of the constitution that's relevant. It's Article XV, Subsection 2, and I'm referring to the bottom of the page of Subsection 2. (Exhibit 17) It says, in part, "No person who is in default as collector or custodian of public money or property shall be eligible for any office of trust or profit under the constitution or laws of this state." And then relevantly, it says, "No person convicted of a felony shall be eligible to any such office unless he shall have been restored to civil rights." That note that that provision would preclude you from running for an office if you had been convicted of a felony or being...taking the oath of office were you convicted for a felony shortly before entering office, but it would not remove you from office if you were already in the office. Now let's take a hypothetical situation. A person commits a felony shortly before an election. It goes unknown until he actually holds office. And then he is convicted while in office. The provision that we just talked about would not remove him from office. The only way to remove him from office is with the impeachment section of the statutes, which is going back

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to the green copy that's before you, because misdemeanors include felonies. But if you interpret that to mean that the felony has to be committed while in office, then, in effect, what you have in the constitution is no way to get a person who has committed a felony before they held office, out of the office. So you have to interpret that provision, in my view, as saying that included in the interpretation of that provision is the fact that anybody convicted of either a misdemeanor or a felony is subject to the provision. And having said all that, Mr. Chairman, I would like to ask the committee to hold the bill because I will be asking for an Attorney General Opinion on this general area, and as you know, this general area relates to current events.

SENATOR BOURNE: Thank you. Questions? Senator Flood.

SENATOR FLOOD: Thank you, Chairman Bourne. Senator Beutler, thank you for bringing this bill. I guess I am interested in the bill within the context of the Legislature. I don't know if you've got the state constitution in front of you there, but I think it's Article III, Section 15, in our constitution, exempts a legislator from arrest or being charged, as I read it, while session is underway. What effect would this amendment have on that provision, if I have the right...? Is that the right section? Except for felony or disturbing the peace.

SENATOR BEUTLER: Section 15, "Members of the Legislature in all cases except treason, felony or breach of the peace, shall be privileged from arrest during the session of the Legislature, or for fifteen days next before the commencement and after the termination thereof."

SENATOR FLOOD: Should we look at your legislative resolution in light of that and possibly work to amend that? It's my understanding that that's in our constitution because it comes from England when the king was able to arrest parliamentarians on their way to session so that they couldn't vote against him. Should we look into amending that with your legislative resolution?

SENATOR BEUTLER: Well, Senator, that's an interesting question and I'm not sure I would like to particularly comment on that until I have thought about it a little bit, but I'll certainly think about it. We can discuss it.

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SENATOR FLOOD: Thank you.

SENATOR BOURNE: Thank you. Further questions? Senator Beutler, do you believe this to be retroactive if it were to be adopted?

SENATOR BEUTLER: If the bill has the narrow interpretation that I'm talking about, which I think that it would, I would think it would not be retroactive.

SENATOR BOURNE: Further questions? Seeing none, thank you. First testifier in support?

RICHARD HEDRICK: I am Richard Hedrick, H-e-d-r-i-c-k. I am for LB (sic--LR) 26CA. There are laws to try to make auto dealers honest. Everyone knows politicians are not any better than any car dealer or a horse trader. This bill would be a help. Thank you.

SENATOR BOURNE: Thank you. Questions for Mr. Hedrick? Further testifiers in support? Testifiers in opposition? Further testifiers, neutral? Senator Beutler? Senator Beutler waives closing. That will conclude the hearing on LR 26CA. The committee will stand at ease for ten minutes.

AT EASE

SENATOR BOURNE: Go ahead and get started. Senator Price to open on LB 143. Welcome.

LB 143

SENATOR PRICE: (Exhibit 19) Chairman Bourne and members of the committee, I'm glad you had a chance to stretch because you've had a long, grueling afternoon. I am Senator Marian Price. That's M-a-r-i-a-n P-r-i-c-e and I represent the 26th Legislative District and I'm the principal introducer of LB 143. LB 143 expands Nebraska's current DNA testing statute to require the collection of DNA samples from all persons convicted of felonies and from all individuals currently serving a sentence for a felony conviction before they are released. I know you recently heard Senator Johnson's bill when it was before this committee, LB 385.

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It's similar to mine in many ways. Senator Johnson is seeking to add burglary and robbery to the offenses included under the DNA detection of Sexual and Violent Offenders Act. My bill seeks to eliminate the list of offenses under the act and simply collect a DNA sample from every felon. In the handouts that have just been handed to you, I have sought to provide you with some information when you compare my bill to LB 385. Including burglary would definitely make a difference as you can see from the data. The state of Virginia who has had all felons, DNA, database since 1990 reported 982 hits in the burglary/robbery category out of a total of 2,100 hits since 1990. This category by far made the biggest difference and the state of Virginia reports that 80 percent of its hits would have been missed if their database were limited to only violent offenders which Nebraska currently does. All 50 states now keep a DNA database on sex criminals and murderers. As of December, 48 states including Nebraska included all violent felons in their database. Forty-seven states included burglary which Nebraska does not. Including burglary will have an impact in Nebraska. However, including all felons in the database achieves the greatest results, I believe. As you can see, Virginia had 351 hits in the miscellaneous category and I cannot tell you exactly what that category includes but you can see that includes all felons versus just burglary. It does have an impact. Thirty-eight states now include all felons and several states are considering legislation like this piece of legislation, LB 143. Including all felons versus just burglary could have an impact on the federal funding that is available to Nebraska as well. In 2004, Congress passed the Justice For All Act. This authorized over \$750 million in forensic DNA grants over five years to cover the costs associated with DNA backlogs and building crime lab capacity. But as you are probably aware, these grants are only available for backlogs. States are positioning themselves for this money by passing all felons legislation which creates a backlog. It is likely in Nebraska would be eligible for more federal funding by passing this piece of legislation because this bill would create a greater backlog. I hope this committee will seriously consider this bill. The upfront costs are not the only fiscal impact. An extensive DNA database will save time and money in the future when law enforcement is able to immediately eliminate suspects and confirm DNA matches. A lot of information there but as you heard Senator

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Johnson's bill which I did not, then you can kind of see how ours differ. But I would entertain any questions. I don't know if there will be any testifiers that will follow, I do not know.

SENATOR BOURNE: Okay. Thank you. Are there questions for Senator Price? Seeing none, thank you.

SENATOR PRICE: All right, thank you for your time.

SENATOR BOURNE: Certainly.

SENATOR PRICE: All right.

SENATOR BOURNE: Are there testifiers in support? Are there testifiers in opposition? Come forward. Have you signed in?

KRISTEN HOUSER: I did.

SENATOR BOURNE: Thank you. If there's other testifiers in opposition, if you'd make your way to the on-deck area and sign in, I would appreciate it.

KRISTEN HOUSER: (Exhibit 20) My name is Kristen Houser. It's K-r-i-s-t-e-n H-o-u-s-e-r and I'm the immediate past president of the National Alliance to End Sexual Violence and have been working against rape for nearly 15 years. I understand that sexual violence can't be stopped if the behaviors of sex offenders is not identified and interrupted so it may seem odd that I oppose expanding the DNA Detection of Sexual and Violent Offenders Act to take DNA from all convicted felons. However, I hope that my years of experience and reputation as a national leader in the movement against sexual violence will persuade you not to advance this bill. DNA is a very useful tool in sexual assault, homicide, kidnapping, and other missing persons cases but not in drug possession, drunk driving, embezzlement, fraud, and other white collar crime investigations which are felonies. Collecting DNA samples from all convicted felons would waste taxpayer money. Many felonies have no significant relation to sexual or other violent offenses. Rather than meaningfully enhance the effectiveness of the current DNA Detection of Sexual and Violent Offenders Act as I believe LB 143 is intended to do,

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it would squander resources and convey a sense of false security to the public. The act could be improved, our current act, by collecting DNA from people prosecuted of nonfelony crimes which are known to be related to sexual offending. For example, crimes such as voyeurism and indecent exposure are not recognized as distinct sex offenses in Nebraska and are not felonies. Perpetrators of these crimes are charged with public indecency or criminal trespass. Though these acts are known to be regularly committed by sex offenders as part of a stalking or planning process for a future assault, may be a preferred method of assault, and demonstrate sexual deviance and a willingness to invade a person's privacy, we would not collect DNA from those convicted of these offenses under the provisions in LB 143. Nor would we collect DNA from johns convicted of soliciting prostitution. Despite the fact that women in prostitution are raped an estimated 13 to 33 times per year on average, are the most commonly preyed upon group by serial killers, and are viewed as a practice population by many rapists, johns are typically fined less than \$100 and sent on their way. By focusing on all felons we exclude these men from DNA collection and miss an opportunity to actually protect the public. Finally, let's not promote misinformation about sex offenders. Many are not criminals in the sense that they commit a wide variety of crimes. Some do, but many don't. Many only commit other acts of violence against women and children, most which go unreported, and many which are not charged as felonies. Nebraska should ground our laws in research rather than "tough on crime" rhetoric. Collect DNA from people convicted of any sex crime against children or adults, those convicted of soliciting prostitution, stalking, animal abuse, arson, burglary, kidnapping of children or adults, physical abuse of children, and all crimes that fall under the realm of domestic violence including physical assault, assault with a weapon, battery, terroristic threats, et cetera. But don't waste taxpayer money collecting and analyzing the DNA of people convicted of credit card fraud, identity theft, drunk driving, or other offenses against the environment. It just doesn't make sense.

SENATOR BOURNE: Thank you. Are there questions for Ms. Houser? Senator Flood.

SENATOR FLOOD: Thank you, Chairman Bourne. Thank you for



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your testimony today. I guess outside of the realm of the sexual assault charges and murder and violent crimes, I see value and I want your reaction. I see value in collecting DNA samples from every inmate whether in a county, city, or state facility because DNA evidence is available in burglaries, in hit-and-run accidents, possibly. I mean it can pop up anywhere. Why wouldn't we want to take the next step and treat DNA evidence like we do fingerprints?

KRISTEN HOUSER: Well, there are several reasons but I think that now is not the right time to take that step. Number one is that the realm of DNA analysis and usefulness is still evolving. I don't believe our state currently has infrastructure which is set up to properly protect people's privacy whether they be the victim of a crime or the perpetrator of a crime. For instance, we don't have any rules regulating what happens to DNA that's taken from victims in crimes when it's collected and analyzed as well. We sort of only focus on felons so I feel like we need better legal infrastructure put into place in our state before we start taking permanent identifiers from people such as DNA which could also be used in terms of insurance companies have impact on medical coverage, et cetera because there's an awful lot of information available there.

SENATOR FLOOD: That seems to me to be and with all due respect to your position, that seems to be outside the scope of what this bill does when we start talking about collection of DNA from victims and insurance companies and from health and medical information. Doesn't it seem...we're going to disagree. It seems reasonable to me that the more DNA samples we have on file from offenders that have been convicted beyond a reasonable doubt, would aid us in criminal investigations.

KRISTEN HOUSER: Well, two things. One, to finish my first point was that I think that we are treading a fine line of invasion of privacy whether or not you're convicted. Being convicted of a crime doesn't mean that you lose all rights to privacy or things that you're entitled to after you are done with your sentence such as health insurance. So I feel like that's applicable whether you're the victim or perpetrator of a crime. I think in terms of what you're saying, criminologists that are associates of mine who have consulted with prior to testifying here, will tell you that

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in terms of violent offenses, violent crime, the majority of those crimes are perpetrated by a very small number of people. Burglary is very much tied to sexual assault. There's a good reason that it's in there. It's also tied to homicide. It's tied to kidnappings. My point is simply that there are many crimes that are misdemeanors which we know are more likely to be tied to other serious crimes which do pose a threat to community safety whereas things such as credit card fraud, embezzlement, white collar crime, crimes against the environment aren't necessarily...

SENATOR FLOOD: What about possession of methamphetamines?

KRISTEN HOUSER: Um-hum.

SENATOR FLOOD: For an 18-year-old youngster in Madison County, Nebraska. He goes down to the state prison. We don't take his DNA.

KRISTEN HOUSER: Um-hum. I don't know that you should. I think if he was an 18-year-old methamphetamine user who has been implicated in other kinds of violent crimes perhaps...

SENATOR FLOOD: What if...let me maybe finish my thought here. He goes down to the state prison. He gets no treatment under our state Department of Corrections system.

KRISTEN HOUSER: Correct.

SENATOR FLOOD: And he's back on the streets in Norfolk in six months and to further his habit he breaks into a house or he goes down for two years. He comes back. Nobody has taken his DNA and he's now fully committed meth addict and he causes a very serious crime to occur by his behavior. And we've had those in Norfolk.

KRISTEN HOUSER: Um-hum.

SENATOR FLOOD: It would seem to me that we would want his DNA on the first or the second visit, preferably the first so that we have that in the system.

KRISTEN HOUSER: Well, that would be one way of looking at it. I would also look at it that when we have people housed in facilities like our prison system or county jails that we

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might be better served by instituting rehabilitative programs to help people get off drugs, get support so that they're not committing crimes...

SENATOR FLOOD: I don't...

KRISTEN HOUSER: ...when they get outside. I think that that's a more useful and less invasive tactic to take.

SENATOR FLOOD: I hundred percent agree with that. But if you sit in district court in my district, we don't have any white collar criminals that are prosecuted that often. And I would argue with you that they need to be checked just as much. If you can take \$300,000 of Grandma's money, you can commit other heinous crimes as well. They're not scot-free.

KRISTEN HOUSER: What we know about people who commit offenses such as sexual violence, homicide, violent crimes against others is that they have certain character traits that are different from others and while somebody who's embezzling money, stealing from the family for whatever reason, may or may not have those kinds of predispositions, I don't think that at this point in time it's in the best interests of our state to be taking permanent identification information when we don't know how else that's going to be used in the future when we have no legal infrastructure to protect it from people.

SENATOR FLOOD: How is DNA different than a fingerprint?

KRISTEN HOUSER: Well, number one, a fingerprint doesn't tell your insurance company whether or not you've got a predisposition to breast cancer, whether or not you've got other kinds of hereditary diseases.

SENATOR FLOOD: Isn't that outside the scope, I guess,...

KRISTEN HOUSER: No, because...

SENATOR FLOOD: we're not talking about insurance companies. We talking about...

KRISTEN HOUSER: ...once it's available...

SENATOR FLOOD: ...Department of Corrections records.

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KRISTEN HOUSER: ...but once that DNA is available, if we don't have legal infrastructure in place to forbid it from going elsewhere, it's vulnerable to being used in ways that are inappropriate and that weren't intended when the law was passed.

SENATOR FLOOD: Can insurance companies get your record from the Department of Corrections today?

KRISTEN HOUSER: I couldn't answer that. I think if you're getting medical service there, I don't know what's in the records. I couldn't answer.

SENATOR FLOOD: Well, we'll disagree on this but I appreciate your opinion. Thank you.

KRISTEN HOUSER: Sure.

SENATOR BOURNE: Further questions for Ms. Houser? Senator Chambers.

SENATOR CHAMBERS: Just for one point. You don't have to get a court order to take fingerprints because they're observable, they're external. There's no invasion of the body to get it and courts have made that distinction, even Nebraska law. Federal court decisions that deal with taking DNA samples whether by a swab of blood extraction or other ways so the law has already made a very clear line of distinction. There is a company that has been sending stuff out to senators about passing bills that would take DNA samples from everybody. They have a financial interest in it and whenever something like this which is going to invade the privacy in general of people, they try to attach it to something that has a high emotional content and right now it's sexual assault or methamphetamine abuse. So they will hook everything as a possibility of being connected to those crimes that they think are really exciting the public. Then without somebody like me in the Legislature, bad laws are passed and people will automatically say, well, this is a good thing and it's protecting the public. And as for people being convicted beyond a reasonable doubt being the ones whose DNA was taken, here's my question. Are you aware that there have been men convicted beyond a reasonable doubt and appellate courts have upheld their convictions of first

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degree murder and they were sentenced to die and placed on death row and were subsequently exonerated? Are you aware that that has happened?

KRISTEN HOUSER: Yes.

SENATOR CHAMBERS: So merely saying that a system which is flawed and which lawyers know will have people convicted because they don't have adequate legal advice, to sit up and say that because that flawed system has said somebody is guilty beyond a reasonable doubt is what justifies taking DNA is a flawed argument. I'm more interested in the points that you made and since you're being the sounding board and my colleague on the left as far as his relationship to me but on the right as far as his orientation compared to mine (laughter) has made some comments just so there would be a balance in the record. I do believe there are offenses which don't rise to the level of a felony which might be more indicative of the likelihood that somebody's going to commit the kind of crimes they say they're concerned about but that's not the real concern of the company that is pushing legislatures to pass these bills. The company is using that as a scare tactic to get these bills passed. But, and Dr. Johnson knows this when he comes. This bill is not going to pass if I have anything to do with it and I want that on the record. So those who are for it can get their best arguments together and count for the 33 votes and I'll tell you why. I've been on this Judiciary Committee ever since I've been in the Legislature. I've seen every manner of proposed legislation come. I've seen companies before get senators to do this and sometimes these companies will hook up with these organizations that put out publications that are sent to senators and they say recommended legislation. And I know it's just a matter of time before they come but when they come I'm ready for them. So you need not think that you're alone in this; you need not think that the testimony you gave which indicates the types of offenses which might be indicative of somebody doing these things, you need not think it fell on deaf ears. Some of my colleagues are younger, less experienced (laughter), and are more easily swayed. But when you reach my age and you've been around the track as many times as I have, you don't do things just to be friends with other senators. When they bring bad legislation, it has to get by me and I assure you that's not going to be an easy task.

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Also, in Omaha not long ago, there was an abuse by the police of taking DNA. And it just happened that all the men were black and it just happened that the description, general as it was, said a man from 5'4" to 5'9", 275 to...I mean 250 to...whatever it was, a big belly. They were taking DNA samples from black men 6'1" and 6'4", muscular. They said he was bald or his head was shaved. Going after young men with dreadlocks. That's what the police do. Now, in Norfolk that never happens so I can understand inexperienced youngsters thinking that when you put something in the law and give the police this power, they're not going to abuse it. But when you're an old-timer like me, you don't want to wait until people's rights have been violated. You head it off at the pass so I don't want you to think you came here in vain.

KRISTEN HOUSER: Thank you. If I could add, I agree. I believe that DNA is overly relied upon to investigate crimes. I think it's a great tool to use if you're working on a stranger case and you have a bank to already compare it from and it's a fabulous tool once you've done your investigation and have made an arrest to figure out whether or not you've got the right person. But I don't believe in fishing expeditions and I believe that there was a study that was put out there which showed in a...I think it was 18 different sexual assault investigations where they did fishing expeditions for DNA to identify a suspect that there were no cases that were solved by doing so. I think that DNA is exciting, it is cutting edge. I think that we will have additional uses for it in the future but I don't believe right now that the use of DNA in investigative procedures is up to speed with other kinds of investigative procedures which are lagging far behind in terms of sexual assault, homicide, and kidnapping investigations.

SENATOR CHAMBERS: And by the way, an Omaha case, they haven't come close to finding anybody so now they've offered a bigger reward...

KRISTEN HOUSER: Yes.

SENATOR CHAMBERS: ...to try to get some information.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you. Appreciate your testimony. Other

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testifiers in opposition? Testifiers neutral? Senator Price to close.

SENATOR PRICE: Thank you, Mr. Chair and members of the committee. In the bill on page 6 it says the DNA samples and DNA records shall only be used by the Nebraska State Patrol to create a separate population database comprised of DNA records obtained under the act after all personal identification is removed. The patrol may share or disseminate the population database with other law enforcement agencies or forensic DNA labs which assist the patrol with statistical databases. So it is a protected list. And then the lady just ahead of me, on the handout if you look at the last page it is entitled solved crimes. It said statistics show that as many of half of the criminals that commit violent crimes have nonviolent criminal histories. Therefore, offenders who are required to submit DNA when convicted of nonviolent felonies will be identified as they leave DNA behind at rape and murder scenes. If a state takes DNA from violent offenders only, the likelihood of solving a particular rape or murder are reduced by 50 percent. That is in this document that I handed to you. I had an interesting comment to me that a person I was talking to said that maybe in the future, maybe in the future that DNA samples will be taken upon the birth of every child. So there would be a record right then. But I mean, that's just something I heard that I thought I would share. They put such importance on DNA. I would entertain any other questions, if anybody had questions.

SENATOR BOURNE: Thank you. Are there questions for Senator Price? Seeing none, thank you.

SENATOR PRICE: I leave this in your capable hands because like I said, Dr. Johnson had...Senator Johnson had a DNA bill and I have this one and I leave this in your hands to make the decision.

SENATOR BOURNE: Thank you.

SENATOR PRICE: I thank you for your attention.

SENATOR BOURNE: Appreciate it. That will conclude the hearing on LB 143. Senator Kruse to open on LB 377. And would those individuals here to testify in support of this

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measure make their way to the on-deck area? Welcome,  
Senator Kruse.

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SENATOR KRUSE: Thank you. Senator Bourne and members of the committee, I am Lowen Kruse, District 13, L-o-w-e-n. LB 377 is referred to often as an HIV assault bill. The bill establishes that it is a criminal act for a person to knowingly expose another person to HIV infection through sexual contact or sharing a needle or giving blood. Quite simply, there are two requirements for establishing that. One, that the offender knows that she or he is HIV positive. Number two, the victim or the blood bank does not know that. Our target in this bill is a criminal action, criminal attitude. Clearly, this act that we're describing here is an assault. I describe that more in a previous opening but just remind you that this is more frightening than being shot for many people. It is a scary thing to have happen and clearly is a way to threaten as well as to hurt someone. The bill was brought last session with fairly broad support in the public and in the halls here. Well, we ran out of time. But using that reference point, this bill has two changes. One comes from you as a committee. We responded to your question of the definition of needles and that has been done. The second is that the charge and penalty has changed if an HIV infection does not occur. I had a little trouble with that personally. It seemed to me the intent is the same but I am reminded that when someone is shot we wait to see what happens to the victim before we determine what the charges are. This bill is a result of contact from several people but especially one citizen who was a victim of that assault and who testified in the last session. She did not know the medicine that her partner was taking was for HIV. Further, when she did learn that she found out that he was hitting on other women he did not like. She became upset about that and was bold enough to go to the prosecutor and try to do something about it. And there she learned something else. She learned there is no law against it. In 25 other states there is a law including Iowa and South Dakota but not in Nebraska. So we have a situation here where a person with a criminal attitude that might use those words, not very precise, but a person who wishes to do someone harm or frighten them and is very clever, can go



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about this process of doing it, frighten, injure, possibly cause the death of the other person and there is a total gap in our law. I frankly do not see much prosecution under this bill. It's very hard to do unless there's multiple victims as there is in the illustration we're using here but otherwise witnesses are not really available and it'd be very hard to prosecute. I think it's important that we declare that this is criminal behavior. That's what this is about, to state a public policy, to state that this is not acceptable. Indeed, this is criminal. The only objection that we have had on the bill was that it may deter some persons from being tested. HIV positive persons who have talked with me have discounted that saying that you are going to want to know if you are positive so that you can get medication. It's not covered in the bill, really can't be. But I would argue that not wanting to be tested while assuming that one is positive and going about activity that is reckless is also criminal behavior. Intent is not a factor. Shooting down an open street is criminal behavior whether you hit somebody or not. I think it's incumbent upon us to define criminal behavior when we see it, when we know it, and to give at least some protection to our citizens. I thank you.

SENATOR BOURNE: Thank you. Are there questions for Senator Kruse? Seeing none, thank you.

SENATOR KRUSE: Thank you.

SENATOR BOURNE: Are there testifiers in support? Are there testifiers in opposition? Okay, I assume we've signed in? Oh, perfect, you guys are prepared. First testifier in opposition, come forward. If you just set them on the edge of the desk then the page will come around and get them so whenever you're ready. Welcome. (See also Exhibit 21)

DARREN McCARTY: (Exhibit 22) All right, well, my name is Darren McCarty, D-a-r-r-e-n M-c-C-a-r-t-y. Senators, I'm Darren McCarty, 19 years HIV positive. I was diagnosed in 1985 here in Lincoln and I reside in Mr. Foley's district. I spoke here when this bill was LB 872 and it still lacks validity to be much of a useful law. The head of this committee has said it was basically a he said, she said type of law. There is no way of proving disclosure ever took place and what is the proper process of disclosing. Should

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I tell them right when we meet, before I kiss them so maybe we can get to know each other first? Or should I tell them right before we have sexual activity? What if I do tell them one night? They say it's cool being in the heat of the moment and then they freak out the next day. Believe me, I've had this happen. When it comes to defining the differences between first and third degree assault, how do we know the HIV status of the person claiming not to be told? As I educate my students about sexual responsibility, I tell them it only takes one time of being irresponsible. How do we know where this person's HIV status came from? When it comes to the definition of sexual act in this bill, it's very vague. There are a lot of sexual situations where no intercourse occurs. What about sexual assault cases? Does an HIV positive person who is attacked get thrown in jail for not disclosing? Yes, I can see setting up a precedent to laws that I need to disclose to everyone whether it be an accident, you know whether car or otherwise. In 1986 I was fired here in Lincoln because my boss told me I had to disclose to all my fellow employees or I would be fired. I hope we haven't come back to that. This law will roll back efforts in Nebraska on getting people tested. The only certain defense to this legislation is not knowing your HIV status. I've had three men come up to me in the last month wanting to be tested. The physical part of this disease doesn't scare people as much anymore as the fact of how it will be used against them. Losing their jobs, farms, families, and social life are the things they worry about the most. Two out of the three said they have heard about this law and they would not be tested. What about the thousands of others who are like them? Nowhere in this bill does it talk about intent. I do not know of anyone who is HIV positive who could live with themselves if they gave somebody HIV and I know hundreds. As I see it in this bill, all the responsibility is put on the HIV positive person to prove their innocence. I have talked to a lot of people since LB 872 was drafted originally. Most people say it should be the responsibility of both parties when it comes to protecting yourself in sexual activity. And if the fear was that this guy was out to intentionally spread HIV and not telling people then what's the harm of adding intent to this bill? That way, those of us who are HIV positive who are doing things right aren't going to be scared of being accused out of the blue. Do you realize just what an accusation, just an accusation, can do? It would be similar

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to one of you being accused of being unfaithful to your spouse. Please, Senators, I ask this of you, be fair, don't hurt my efforts in getting people tested and add intent to make this law to be fair for all of us who are involved.

SENATOR BOURNE: Thank you. Are there questions for Mr. McCarty? Senator Chambers.

SENATOR CHAMBERS: Not really a question. Mr. McCarty, sometime maybe you can give me a call. I do a weekly cable program and I've been trying to encourage...mainly black people watch the program, I think, but more might to be tested. I'm not aware of having done anything that would give me exposure but I've told people in my community that I should be an example so I'm going to get tested myself. It is extremely difficult whether people think they have it or not. There's just, at least in my community, a disinclination to be tested. You can tell them it's simple, it's not going to hurt, it's confidential. But I haven't been able to break through so if you have some ideas, I'd appreciate really. Call me at my office because I'm trying to get the same thing done and I emphasize that if you test and you're positive, get some treatment, get some help. But some people have strange notions about what constitutes being HIV positive and they don't want to know. It's almost like if they don't know then nothing is going to happen. So I'm making this statement not just in the context of this bill but I don't know where else to turn and with the way you've given your testimony, you may have some techniques that I can make use of that will be valuable. So if you're willing to help me do that, I would appreciate it.

DARREN MCCARTY: Well, yeah, I do have 14 years of speaking experience, of getting, you know, out there speaking to colleges, youth groups, Catholic groups, you name it. And, you know, and I do, you know, I do get out the word to get people tested. And that's what scares me so much about this bill. You know, these people actually came up to me in my gym, you know, where I work out at. And they came up to me and they told me, we are scared. We are scared of being tested. We don't want to be classified as a criminal. You know, we have enough to worry about when HIV...when we have to go get tested to begin with. And then to be put into this whole other almost...and nothing against the, what I would call the intent of this bill because there are mean

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people out there. There are absolutely mean people who have, you know, but that is such a minuscule amount of the population compared to the people who are responsible HIV positive people. And that's what this bill hurts, you know. You'll hear from several speakers here today are long-term survivors of this disease and we can all attribute our status, where we are today, by getting tested early, by taking medications and still being here to this day. You know, but if you don't get tested early, people what happens is, they're going to wait to die. You know, then they're going to enter our Medicaid system, you know, basically with full-blown AIDS and then it gets, you know, super costly from there. This bill almost, to me, costs Nebraska more, you know. So I'm sorry for my additional comments there.

SENATOR BOURNE: No, that's all right. I appreciate your input. Further questions for Mr. McCarty? Seeing none, thank you.

DARREN MCCARTY: Thank you.

SENATOR BOURNE: Next testifier in opposition?

ROSALEE HIGGS: (Exhibit 23) My name is Rosalee Higgs, H-i-g-g-s. I coordinate the HIV testing and counseling program at Nebraska AIDS Project. The Centers for Disease Control estimates that as many as one-third of the people infected with HIV in the United States have not been tested and do not know they're infected. Efforts to reach this population through HIV testing and counseling services will be seriously impacted should LB 377 be enacted. Nebraska can be proud of its efforts in increasing availability and access to HIV testing services. At last report, close to 2,000 Nebraskans have had the opportunity to learn their HIV positive status, get into medical care, and take steps to eliminate their risk of spreading HIV to others. LB 377 threatens our success in this area by discouraging people from learning their HIV positive status. Without language regarding intent, the use of protection, or a way to prove disclosure, an individual's only defense against this law is ignorance. This ignorance is costly. Not only will the burden on our health-care system increase as people wait until they are seriously ill to learn of their infection, an undiagnosed HIV infection will inevitably lead to the spread of HIV. LB 377 will lead to an increase in the number of

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HIV infections albeit undiagnosed ones. In addition, the individualized nature of the HIV testing and counseling session is often the most meaningful place people receive HIV risk reduction information relevant to their specific situation. In discouraging knowledge of one's HIV status, LB 377 will impact the available venues in which people will receive individualized HIV education. Nebraskans are fortunate to have access to both confidential and anonymous testing services. Confidential testing in which the client gives their name and contact information is the preferred method of testing, as having this information allows us to offer the client partner notification and referral services. Partner notification and referral allows us to contact clients who have recently tested positive to get contact information of others they may have exposed to the virus so they, in turn, may be offered testing. This contact is performed discreetly and the source of the potential infection is withheld. This service allows people who have recently learned their HIV positive status to refer past partners to testing without needing to reveal their HIV status to them. Many people are referred to testing through partner notification and referral who otherwise would not have gotten tested. This law will threaten the viability of this important service. The threat of being held criminally liable for having one's name attached to a positive HIV test will severely limit people's willingness to participate in this vital part of HIV prevention. The inescapable result aside from a refusal to get tested altogether will be an overwhelming switch to anonymous testing in which the client tests without giving any identifying information. This option, while important for those who otherwise would refuse to get tested, does nothing to encourage participation in partner notification. Our hands will be tied in stopping chains of infection. I urge you to maintain Nebraska's current success in HIV prevention and support us in making HIV testing an accessible and acceptable part of healthcare. LB 377 will discourage HIV testing and will be detrimental to this goal. Thank you.

SENATOR BOURNE: Thank you. Are there questions for Ms. Higgs? Senator Flood.

SENATOR FLOOD: Thank you, Chairman Bourne. Thank you, Ms. Higgs, for your testimony. It seems to me and maybe Senator Chambers knows this better than I, but don't we have

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laws on the books right now that address, that protect HIV information and medical records from being released?

ROSALEE HIGGS: Yes, we do.

SENATOR FLOOD: So this bill, even if passed, wouldn't allow a prosecutor to get that information? You still can't subpoena those records, is that right?

ROSALEE HIGGS: True, true.

SENATOR FLOOD: So, on its face, this bill probably won't ever be used because the only way to find out if someone is HIV positive would be to subpoena those records. I'm not...

ROSALEE HIGGS: Unless there was...

SENATOR FLOOD: ...and I'm not saying this because I disagree with the current law...

ROSALEE HIGGS: ...okay.

SENATOR FLOOD: ...but I'm just saying that it's going to hamper the success of this, won't it?

ROSALEE HIGGS: True, yes, unless an accuser were to come forward in which case the person's HIV status would be made public.

SENATOR FLOOD: Does that law, and you'll probably know better than me but prohibits HIV information from being subpoenaed, does that also extend to the medical information or the narrative that the doctor provides in his or her medical record about why a person came in for a test?

ROSALEE HIGGS: That I don't know. We're not a clinic. We strictly provide testing then refer away for medical care so that I don't know.

SENATOR FLOOD: Because that on its face would concern me if they could not only just get the test but the medical records...

ROSALEE HIGGS: Sure. I'm not...

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SENATOR FLOOD: ...to show conduct and maybe somebody behind you is familiar with those...

ROSALEE HIGGS: That's possible.

SENATOR FLOOD: ...rules but I appreciate your testimony. Thank you.

ROSALEE HIGGS: Thank you.

SENATOR BOURNE: Thank you. Further questions for Ms. Higgs? Seeing none, thank you. Next testifier in opposition?

JOSEPH CONRAD: (Exhibit 24) I'm Joseph Conrad, J-o-s-e-p-h C-o-n-r-a-d. My name is Joseph Conrad. I live in Omaha, Nebraska. I've been living with HIV since 1986. I've spent the better part of the last 13 years educating Nebraskans about HIV prevention and promoting personal responsibility for knowing your own HIV status and the status of anyone you choose to be intimate with. I testify today against LB 377 for several reasons but I limit my comments to the following: No sane person would support or encourage reckless, intentional and criminal transmission of HIV to unsuspecting or noninformed persons. In fact, most of us impacted by HIV take responsible precautions to prevent the spread of HIV through honest education and partner notification. LB 377, on the other hand, gives the perception that a rampant problem exists creating the need for legal injustices and unfair burdens of proof that we, the HIV community, have for certain impacted irresponsibly and dishonestly. To be fair, I would say that ignorance and/or lack of personal responsibility is not valid as an excuse or a defense. To also be fair, we should agree that 50 percent of transmission prevention is a shared responsibility of personal protection. LB 377 would encourage ignorance as a defense for sexually active persons who may or may not know their own HIV status to abuse the legal system and cause retribution or punitive resolutions against anyone who is HIV positive or has AIDS. Of greater importance and in dire need of reconsideration is the use of proximate cause to determine the responsibility and a supposed definitive source of any new HIV infection. I ask you these questions: How would the legal system, taking a fair look at complaints filed under LB 377, determine the

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preexisting HIV status of any plaintiff who is now or has ever been sexually active or ever participated in any defined risk factor over the past 22 years used by the CDC? How would the legal system taking a fair look at complaints filed under LB 377 establish truth from two contradictory statements of disclosure/nondisclosure by the plaintiff and accused? How would the legal system, taking a fair look at complaints filed under LB 377, assign financial responsibility of HIV testing to establish that HIV infection exists in either plaintiff or accused? An event may have more than one proximate cause, but only one immediate cause. Why then should LB 377 utilize only proximate cause and completely ignore immediate responsibility and immediate cause resulting in a judgment based solely on nonimmediate, nonresponsible circumstances? Such laws to prove the source of a new HIV infection on proximate cause instead of immediate cause as its standard, is equal to empowering HIV negative individuals to point a half loaded gun at their head and pulling the trigger. Specific and clearly written laws serve a greater purpose of fairness, equal justice and legitimate punitive assignments than those with gray areas left to interpretation, manipulation, and discrimination as LB 377 is written. Thank you.

SENATOR BOURNE: Thank you. Are there questions for Mr. Conrad? Seeing none, thank you. Next testifier in opposition? Welcome.

CINDY WHITE: (Exhibit 25) Hello. My name is Cindy White. I would like to tell you that I am totally black-blind. I'm not just cool wearing these sunglasses. I really wear them for protection so I hope that I don't offend any of the members of the committee this afternoon. I am submitting my written testimony. Oh, my last name, W-h-i-t-e.

SENATOR BOURNE: Thank you.

CINDY WHITE: I'm submitting my written testimony but obviously, due to a lack of being able to read it myself, I will just clarify a few points that I feel need a little bit more information thrown towards them. I believe I contracted HIV 20, 21 years ago. At that time, I did not realize it, obviously, in the early eighties. HIV was a virus that only gay men were getting. However, gay men are



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not the only ones having sex, to my knowledge, so, unfortunately, for me I was put at risk too. I have never felt like a victim but under Senator Lowen's comments, the person that gave me HIV made me a victim of it as well. However, for six, seven, eight years, not knowing it, I, without knowing it, infected other men in my life. Unfortunately, as a mother, now as a widow, as a daughter, a sister, a cousin I could go on and on, HIV has still never totally defined my life. Despite the fact of it taking my eyesight and a lot of other medical complications, HIV has never defined me totally. The problem I have with LB 377 and I speak in opposition to this bill this afternoon, approximate cause is something that cannot be proved with this virus. In fact, even though I believe I contracted HIS 20, 21 years ago I found out much later due to partner notification that one of my lovers was bisexual because contrary to popular belief, even though those records are to be kept confidential in partner notification I was told someone else on a list that I was on. So I know, in fact, that my lover, Greg, was bisexual and also gave HIV to my friend Wes Bowen (phonetic) who was a gay man. Now, did my virus mutate strictly because of my own cross mutations? Probably but also because I will never know how many other people I slept with that could have been HIV positive during the time that I had unprotected sex. I also believe that with all the CDC reports on body fluids, blood, semen, and vaginal secretions and breast milk are body fluids that carry and transmit HIV. And I hope that since breast milk is not currently a part of this legislation that it will not become part of this legislation due to the fact that unfairly puts the burden of proof or burden of responsibility on mothers. So I thank you for your time. Are there any questions for me?

SENATOR BOURNE: Thank you. We appreciate your testimony. Are there questions for Ms. White? Seeing none, thank you.

CINDY WHITE: Thank you.

SENATOR BOURNE: We appreciate you taking the time and telling us your story very much. Next testifier in opposition?

BRIAN KIRCHHOFF: (Exhibit 26) Good afternoon, Senator Bourne, members of the Judiciary Committee. For the record,

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my name is Brian Kirchhoff, K-i-r-c-h-h-o-f-f. I am here today to offer my strong opposition to LB 377 because I believe the vagueness of the wording of this legislation and phrases such as could result and the lack of a definition of disclosure are sufficient to create substantial interpretations problems with this legislation if it were to be implemented. In addition, there exists a substantial burden of proof issue that remains unresolved in the legislation and creates a major barrier to the effective implementation of LB 377. The phrase, could result in the definition of disclosure, page 2, lines 9 through 16 refer to a person who knowingly engages in sexual intercourse with another person or performs or submits to any sexual act with another person through which contact with blood, semen, or vaginal secretions could result without disclosing to such persons the fact that he or she is an AIDS or HIV afflicted person prior to sexual intercourse or the sexual act and is the proximate cause of such sexual intercourse or sexual acts such as the person tests positive for AIDS or HIV. It is unclear in this legislation if an act in which a person demonstrates an intent not to spread HIV or AIDS such as taking actions such as the use of a condom, would still qualify as an act that could result in the spread of AIDS or HIV. The phrase, could result, would, in effect, take the intent standard out of first- and third-degree assault, making HIV status itself a crime under the eyes of this legislation. Using the "could result" standard would cause any such act as a kiss between two people to be considered a prosecutable offense because it is a rare possibility that a kiss could result in the exchange of blood between two people while kissing if there is a cut in someone's mouth. In effect, this phrase "could result" is so overbroad that it makes a person's HIV status a prosecutable offense in and of itself. In effect, a person who takes measurable actions to limit or prevent the spread of HIV such as using condom before having a sexual contact with another person could still be prosecuted under this legislation even if the result of that sexual contact is that there is no spread of HIV disease which is the most likely result if the person who is afflicted with HIV or AIDS correctly uses a condom before sexual contact is made. The "could result" standard, in effect,...

SENATOR BOURNE: Can I interrupt, Mr. Kirchhoff, for just one second?

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BRIAN KIRCHHOFF: Yes.

SENATOR BOURNE: Your testimony is, I think, really important to the committee. If you're rushing so you can get through because of the lights...

BRIAN KIRCHHOFF: Sorry.

SENATOR BOURNE: ...that's okay. Just, I mean, what you're saying here is very relevant. It's going right to the bill so just...we'll ask questions and give you some extra time so...

BRIAN KIRCHHOFF: Okay. I will slow down a little bit. (Laughter) That is the result of debating for way too many years in high school and college so I will slow it down a bit.

SENATOR BOURNE: Thank you.

BRIAN KIRCHHOFF: The "could result" standard, in effect, makes prosecutable an act that does not result in the spread of the disease and demonstrates no intent to spread the disease thus supporting the claim that this legislation makes HIV status in and of itself an offense rather than an intentional offense. The clear lack of definition of disclosure is further problematic. There is no standard for what constitutes adequate disclosure from an HIV or AIDS afflicted individual to their sexual partner. If the person is mentioning their status hours before any sexual contact occurs, is that sufficient disclosure under this legislation? Is showing another person the positive results of an HIV test required before sexual contact can legally occur? Would disclosure from a person who is HIV positive and under the influence of drugs or alcohol to another person who is under the influence of drugs or alcohol be adequate disclosure under this legislation? With the lack of a definition of what constitutes disclosure in this bill, there are questions that could be left up to interpretation of law enforcement, complainants and judges who would be left to interpret this legislation in whatever way they saw fit. These overbroad terms would allow the legislation to be enforced inconsistently and without clear understanding of what constitutes assault to a person who could be tried

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and convicted under this legislation. I'll briefly state my burden of proof problems with this as I see that my time has expired. As stated previously, the burden of proof is hard to establish within LB 377 and, as mentioned before, this is primarily hearsay evidence that wouldn't necessarily be used in the prosecution of these cases. If the standard being proven is that of disclosure then the evidence that needs to be proven is that one person told another person of their HIV status before any sexual act occurred. This necessarily relies heavily on hearsay evidence. The burden of proof is on whether he or she informed their partner before any sexual act occurred and this will always be difficult to objectively approve. These problems will be further exacerbated by the many cases which will surely involve one or more of the parties in the sexual act being of impaired judgment due to the influence of drugs or alcohol. Research and experience has proven that states of impaired judgment are often contributing factors to sexual acts which tend to be of higher risk of exposure to HIV and AIDS. The logistical barriers will be hard to overcome and will make LB 377 an extremely difficult piece of legislation to ever successfully implement in Nebraska and that does conclude my testimony for this afternoon. I would be happy to field any questions or comments at this time.

SENATOR BOURNE: Thank you. You understand I was just...

BRIAN KIRCHHOFF: I understand entirely...

SENATOR BOURNE: ...I didn't want you to rush through. It's obvious...

BRIAN KIRCHHOFF: ...I have a real bad habit of doing that (laugh).

SENATOR BOURNE: It's just obvious you've read the bill and given it a lot of thought and have some really good points. I thought they were valuable.

BRIAN KIRCHHOFF: And the substance of what I spoke is in the handout that I passed out in addition to some other points that relate to some statements that other people will be making and have made.

SENATOR BOURNE: Thank you. Are there questions for

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Mr. Kirchhoff? Seeing none, thank you.

BRIAN KIRCHHOFF: Thank you.

SENATOR BOURNE: Are there further testifiers in opposition?

KRISTEN HOUSER: (Exhibit 27) Again, my name is Kristen Houser, H-o-u-s-e-r, and I'm here again to talk to you about rape and prostitution. Right now I'm here representing the Dignity Cooperative which is a group of organizations and citizens concerned for the welfare of people in prostitution in Omaha. And we oppose LB 377. While we support actions which curb the transmission of HIV and AIDS, we do not regard incarceration as one of those practices. People in prostitution are at high risk for exposure to and transmission of HIV. Prostitutes who are HIV positive have contracted the virus from someone else and it's one of the many ways that these women are victimized, mostly women, some men, some transgender. This bill does not make provisions for HIV positive victims of rape or other physically violent acts which may result in the exchange of body fluids and possibly transmit HIV. People in prostitution experience very high levels of sexual and physical violence at the hands of those who purchase them. It's a myth that prostitutes cannot be raped. People in prostitution experience rather frequent vaginal, oral, and anal rape, battery, and assaults with weapons. Studies estimate that women in prostitution are raped between 13 and 33 times per year. It's ludicrous to expect anyone who's being raped or beaten to meet a legal obligation to notify their assailant of their HIV status by shouting it out at such a time in addition to our concerns about being impaired with drugs or alcohol which very much applies to this population. Of great concern to us is the fact that this bill completely removes all responsibility from johns for their actions. Johns prefer anonymity, are attracted to the vulnerabilities of people in prostitution and often get off on the power that they wield over those that they purchase. Research on their habits tells us that many johns are willing to pay more money to have sex without a condom, prefer sex acts without a condom, may beat prostitutes when asked to use a condom, and are repeat buyers. Johns act with deliberation to seek out sexual encounters which pose a risk to the health of the people they purchase and used, the partners that they lie to at home, and to themselves.

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People in prostitution are also easy targets for arrest and incarceration under this law as many law enforcement officers know their HIV status. An officer who took me on a ride along in Omaha pointed out people who were HIV positive and prostituting as we drove around violating their legal rights to privacy and medical confidentiality. Other officers have told me that they will use the list of declared medications provided by people they've arrested to determine the HIV status of those people. We're deeply troubled by these practices and we have serious concerns that adequate physical and mental healthcare for HIV positive people is not available in the correctional system and that this bill will result in additional unmet burdens. The penalties prescribed in LB 377 only enhance the fear of learning one's HIV status. If one doesn't know they're HIV positive, they cannot be prosecuted for knowingly exposing others. It's crucial that people in prostitution be regularly tested for HIV for the sake of their own health and that of the public. The Dignity Cooperative is most concerned with assisting people out of prostitution and getting healthy. Incarceration is not the answer. If it were, prostitution would have been conquered centuries ago.

SENATOR BOURNE: Thank you. Are there questions for Ms. Houser? Seeing none, thank you.

KRISTEN HOUSER: Um-hum.

SENATOR BOURNE: Next testifier in opposition?

EMMERT LIND: (Exhibit 28) Good afternoon. Emmert Dean Lind, L-i-n-d. My name is Emmert Dean Lind and I am an HIV positive constituent living in the Panhandle of Nebraska. I would like to thank the committee for the opportunity to express my opposition to proposed LB 377. Primarily, I would like to focus my comments to this committee on a phrase contained throughout the bill that refers to "any sexual act with another person through which contact with blood, semen, or vaginal secretions could result." My concern is that the vague terminology utilized in this statement, especially the words "any" and "could" would leave the interpretation of legal guidelines entirely open to the discretion of each individual prosecutor in each individual county across Nebraska. The utilization of such vague terminology raises the distinct possibility of an

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unbalanced and unfair patchwork of prosecutions throughout the state depending upon the personal opinions and inclinations of each county prosecutor. An individual's interpretation of any sexual act could conceivably include a vast array of actions ranging from penetration to mutual masturbation to fondling or frottage. Broadly interpreted, even the act of kissing could be included due to a possible exposure to blood should an individual's gums be bleeding. Nor does the wording of this statute differentiate between protected and unprotected activity. If there are no specific definitions explicitly delineated within the wording of the law, it is not possible for individuals to follow the letter of the law with any certainty nor would it be fair to hold anyone accountable for an alleged deviation from the proposed intent of such a law. An additional concern is that some, but not all possible modes of transmission, have been specifically identified within the language of this bill. While it is commonly accepted that blood, semen, vaginal secretions, and breast milk are all possible modes of transmission of HIV, this bill specifically identifies only exposure to blood, semen, and vaginal secretions as a basis for prosecution. It would be unfair to criminalize only a portion of the transmission modes while ignoring others because in order for a law to be just it must be applied equitably to all. I agree that every individual that has any sexually transmittable disease be it hepatitis, herpes, gonorrhea, syphilis, human papilloma virus, Chlamydia, or HIV must behave in a responsible manner to see that the disease is properly treated and not passed to others. In fact, many of these are lifelong chronic diseases and can be as potentially devastating as HIV. If we are going to attempt to legislate protectionism, should not these diseases also be included in any proposed legislation? To focus only on HIV is to further stigmatize those citizens that struggle day to day living with this disease. I truly believe that the vast majority of HIV positive individuals act responsibly. To single them out with this criminalization statute would be an injustice and would, in fact, have a negative and devastating impact upon our efforts to stop the spread of HIV. Whenever I speak to people about HIV prevention, I always stress the following: Only you can protect you. Your partner may be ignorant of their HIV status. They may be in denial of their status or they may not clearly disclose their status. Regardless, the only way that you can be

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absolutely sure of your safety is to protect yourself. As this statute is written, ignorance of your HIV status would be the best defense. The key to prevention is education and understanding, not additional stigma or discrimination. Therefore, let us work to empower all individuals, regardless of their HIV status with the knowledge and strength of self to treat themselves and others with the respect that we all deserve. Thank you.

SENATOR BOURNE: Thank you. Are there questions for Mr. Lind? Seeing none, thank you. Next testifier in opposition?

JOE HOAGBIN: Thank you. My name is Dr. Joe Hoagbin. I'm assistant professor at the University of Nebraska Medical Center. I'm deputy director of the HIV clinic there.

SENATOR BOURNE: Could you spell your last name for us, Doctor?

JOE HOAGBIN: (Exhibit 29) Hoagbin, that's H-o-a-g-b-i-n. And I just want to start out with a comment. I was in Washington, D.C. last week. They asked me to give a talk there and it was really nice. I had to go through so many lines of security and it was such a pleasure to come to our building here and not to have any security. And I thought, it's not necessary in Nebraska. and I want to tell you something, LB 377 is not necessary in Nebraska. At the HIV clinic at the university, we care for about 90 percent of those Nebraskans in care for HIV both at our clinic in Omaha and our outreach clinics at Grand Island and North Platte. And we feel we have a good understanding of the behaviors and of our patients. We do not feel this bill will do anything for HIV prevention. It's been our experience that HIV infected persons behave responsibly in their personal interactions with others including their sexual interactions. HIV infected persons minimize risk to others by being abstinent, by using safer sex reduced risk sexual practices including condoms, or have sexual interactions with other positive persons. We do not feel that this legislation will deter a sociopath such as Senator Kruse's, a person that he was talking about. In addition, I want to tell you there have been some studies recently that have shown that disclosure of HIV status really does not change behaviors. So one can disclose status and still be involved



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in high risk behavior. In addition, there has been some recent analyses of all the current HIV criminalization laws in the United States. Of those 25 states, by Johns Hopkins and Yale University and it shows that the statute did not make any difference in HIV rates in those states. Moreover, reviewing the 316 cases that were prosecuted through 2002 and this was from when these laws were first started, almost all the cases could have been prosecuted under non-HIV specific statutes because the alleged behavior by the defendant was already illegal regardless of HIV exposure. Moreover, most of these statutes have been almost exclusively used against minorities, sex workers, and prisoners. We feel that HIV infection involves two people, the HIV positive person and the HIV negative person. All individuals must take personal responsibility for their health and well being. In 2005, persons who engage in sexual intercourse without a condom run the risk of acquiring HIV. This is why prevention education is so important for our entire population as the face of HIV is changing with more women, minorities and older Nebraskans becoming infected. Epidemics have always been a part of the human experience from Black Death to leprosy to syphilis to AIDS, medical epidemics cause fear and panic. Such fear and panic yield to inevitable discrimination against groups of individuals who become scapegoats for a biological micro-organism that causes the illness. Syphilis was not defeated by the Contagious Diseases Act but by penicillin. AIDS will be defeated by improved education and prevention efforts, improved testing, availability of care, and adequate funding for care and medications.

SENATOR BOURNE: Thank you. Are there questions for Dr. Hoagbin? Seeing none, thank you. Next testifier in opposition? Are there any neutral testifiers? Senator Kruse to close.

SENATOR KRUSE: Thank you, Mr. Chairman. First, I want to underline what has already been said, that the great number of HIV positive persons are very responsible and reckless behavior that we are considering here would not be something they would do. I am also a strong supporter of NAP and like Senator Chambers, am one of those out recruiting people to get tested and so on so that's not the question before us. There have been a wild array of actions imagined here. I just would affirm that under this bill or anything else that

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I know, being HIV positive is not a crime and it would not be. It is the reckless behavior that we are looking at. I would grant that it's hard to prosecute. I said that in opening. Senator Flood, the case that I gave would have been prosecutable and last time I didn't want to extend the committee's time at this time but (laugh) we had a prosecutor here who said how that would happen. Because there were two witnesses, one of them the ex-wife of this man who knew that he was HIV positive because he'd said so and because of the medication he was taking, they'd known it over a long time. That would be unusual. Again, it is the important thing is to make a statement of public policy. Intent was mentioned. That would kill the thing. I would, you know, make the thing useless because you're not going to prove intent. Protection was mentioned. We considered putting that in but were told pretty clearly that there is no guaranteed protection. So that's also a misuse of thought. What I come to and what I hopefully would come to is that the public policy should be that reckless behavior is unacceptable. Some have said it doesn't happen. Well, it does happen (laugh). And for those for whom it happens, it is a horrible experience and seems to me we should apply ourselves to it. Thank you.

SENATOR BOURNE: Thank you. Are there questions for Senator Kruse? Seeing none, thank you. That will conclude the hearing on LB 377. Thank you.

SENATOR CHAMBERS: Before we begin, how many people are going to speak in favor of LB 292 which Senator Bourne is bringing? One. How many are going to speak against? None. How many neutral? None.

LB 292

SENATOR BOURNE: Thank you, Senator Chambers, members of the Judiciary Committee. My name is Pat Bourne. I represent the 8th Legislative District in Omaha, here today to introduce LB 292. I introduce this bill on behalf of the Attorney General's Office. The intent of this measure is to streamline the process used by law enforcement to obtain evidence from companies based outside of our state. Currently, in a criminal investigation involving an out-of-state company, law enforcement must go through the

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company's home state in order to obtain a search warrant. Under LB 292, any company that files a certificate to conduct business in the state of Nebraska would have to agree to accept the service of local search warrants. I believe there is somebody here from the Attorney General's Office who can go into more detail as why this measure is needed. Thank you. I'll try to answer any question that you may have.

SENATOR CHAMBERS: Any questions of Senator Bourne? I see none. Thank you, Senator Bourne. And I return to you the awesome responsibility of chairing this committee.

SENATOR BOURNE: With you on the committee it is, indeed, awesome.

SENATOR CHAMBERS: Touche.

JEFF LUX: Good afternoon, Chairman Bourne, members of the committee, my name is Jeff Lux. Last name, L-u-x. I'm an assistant attorney general here in the Nebraska Attorney General's Office, speaking in support of LB 292. LB 292 basically allows the Nebraska law enforcement who are looking for records or documents that are in possession of a foreign corporation that is doing business in Nebraska. It allows law enforcement to serve their agent with a search warrant for those documents. This is not a consent to search. It's a consent for them to receive service of our search warrant. Basically by agreeing to have a certificate of authority to conduct business in the state you're consenting to this type of procedure. It's important because one, it streamlines the process. We still have the same standards of probable cause but a different court is looking at the search warrant and it's being served here in Nebraska as opposed to the home state of the company. It's important also because of a time component. If we're looking for documents especially documents that are electronically stored records, the time factor is important. If we need, say, an e-mail or if we need IP addresses from a service provider, say AOL. AOL only keeps their read e-mails for two days. They only keep their unread e-mails for 28 days. If we're trying to track someone down and all we have is an IP address they only keep their IP addresses between 60 and 90 days. So the time that it takes to get a search warrant in the current method sometimes can produce a

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loss of evidence. And depending on what service provider you're looking for, those are different amount of time that they're keeping evidence that's electronically stored. And under federal law, if something is electronically stored evidence you need a search warrant. A subpoena won't work. So depending on whether you want information from cable, satellite, Internet, wireless, pager, financial, credit cards, this would help streamline that process. And all sorts of crimes we are investigating, thefts, enticement of children over the Internet, child pornography, forgeries, identity thefts. So this bill I think is important for those reasons. And I'd entertain any questions.

SENATOR BOURNE: Thank you. Are there questions for Mr. Lux? Seeing none, thank you.

JEFF LUX: Thank you.

SENATOR BOURNE: Other testifiers in support? Testifiers in opposition? Testifiers neutral? Closing is waived. That will conclude the hearing on LB 292 and the hearings for today. Thank you.